No. 14,996

In the

United States Court of Appeals

For the Ninth Circuit

HAROLD L. WARD, et al,
Appellants,

v.

UNION BOND & TRUST COMPANY,
a Corporation,
Appellee.

Appellee's Brief

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STATEMENT OF THE CASE

The case involves an instalment contract for the purchase of real property, under which appellee (purchaser) was in possession, and appellants (sellers) retained title as security for the payment of the purchase price. Appellants gave appellee notice of cancellation of the contract, and in this action seek to enforce a strict forfeiture of all of the rights of appellee under the contract and the interests of appellee in the property.

Appellants, by their statement of the facts, have endeavored to oversimplify the case. There are material omissions, and in some respects statements not justified by the record. The oversimplification results primarily from a complete misconception of the judgment from which they appeal. They argue that the trial

court was in error in reinstating appellee under the contract. The judgment did *not* reinstate appellee under the contract. The judgment was one of strict foreclosure (as distinguished from forfeiture) against appellee.

By its amended complaint (114)[1] appellee admitted, through inadvertence, to partial failures in the making of certain instalment payments within the strict terms of the contract, and sought to be reinstated under the contract. Appellants filed a cross-complaint (39) by which they sought to forfeit the rights of appellee, to quiet their title to the land, to permanently enjoin appellee from entering upon the land, *and* for a money judgment for all amounts payable up to the time of the notice of cancellation, including the amounts for which the right to forfeit is claimed and amounts not due under the terms of the contract. They seek, and urge on this court, to stand on the contract and enforce it, and forfeit appellee's rights under it; to compel appellee to cure all of its defaults, for which the right to forfeit is claimed, and still be subjected to forfeiture. In connection with the money judgment sought by appellants, appellants obtained a writ of attachment (165) and levied it against a bank account (166-7) and other property of appellee, of a value far in excess of the amount claimed (707).

The judgment quieted appellants' title to the property (in part, the relief sought by appellants), conditioned, however, on the failure of appellee to pay the full balance of the purchase price, being the sum of $164,140.03, and damages in the amount of $35,514.85.[2] These amounts were paid by appellee, and the money is presently being held by the clerk of the court below for the account of appellants, subject to their withdrawal at any time. By these payments appellants have received the full purchase price of the land, full performance of the contract, and have been fully compensated for all loss or damage sustained.

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1. The figures in parentheses, unless otherwise identified, refer to pages of the printed transcript of record.

2. This included attorneys fees in connection with this litigation in the sum of $20,000.00.

At the time of the judgment and payment by appellee there was due under the contract only $87,729.17. The condition of the judgment, however, was that appellee pay the full unpaid purchase price, which represented an accelerated payment under the contract, by more than a year, of $76,410.86. The judgment did not reinstate appellee under the contract.

The Contract.

The contract bears date and was executed on May 1, 1946. Purchaser went into immediate possession, and has continued in possession to the present time.[3] The contract is between Blue Creek Redwood Company, Inc., as seller, and A. K. Wilson, as purchaser. Wilson was, and is, President of appellee. The contract by its terms, paragraph 17 (22), contemplated the assignment of the contract by Wilson to a corporation. This was done and appellee was substituted as purchaser, and thereafter continued as such. In 1952, Blue Creek Redwood Company, Inc. was dissolved, and its assets, including its rights under this contract, were distributed to its stockholders, appellants in this proceeding.

At the time of the execution of the contract Harold L. Ward, one of appellants, was President of Blue Creek Redwood Company, Inc., and continued in that position until the dissolution of the corporation (189). Thereafter, Ward, together with Frederick

3. After the notice of cancellation appellants attempted to forcibly retake possession by barricading roads and posting signs (69-70). They were not successful (70-71). They went even further. Rank, attorney for appellants, sought out employees of appellee (754), independent logging contractors logging for appellee (742), and independent log hauling contractors (75, 766) and told them the operation would be shut down and they were without jobs. They knew the logging contractors were logging on other lands (69, 76) but threatened that if they removed any timber they would have to pay for it (743). They knew there were logs to be hauled which did not come from or over these lands. They induced a deputy sheriff, without warrant or authority, to threaten the employees of appellee and the logging contractors (72, 73, 79). As a result, appellee (757, 770) and the independent logging contractors (745) lost key employees. The log haulers took other jobs (768). (Certain of the above references are from the affidavits of Fleckner (65) and Harvey (74). Each testified that his affidavit was true (407, 421).)

S. Strong, Jr., was appointed attorney-in-fact to act on behalf of all appellants in any matter connected with the agreement. The contract was negotiated and executed by Ward (189) and Wilson. During all of the negotiations and at the time of the execution of the agreement, Ward and Blue Creek Redwood Company, Inc., were represented by Carleton L. Rank and Lawrence S. Fletcher, attorneys at law, the attorneys representing appellants on the trial of this case (190). During the negotiations and at the time of the execution of the agreement, Wilson was not represented by independent legal counsel (191). The agreement was drafted and prepared by the attorneys for Ward and Blue Creek Redwood Company, Inc. (190).

Under the agreement, seller agrees to sell and convey, and purchaser agrees to buy certain land located in Humboldt County, California, for a total purchase price of $750,000.00. The land consists of two parcels, the property described in paragraph 1 (10), for which the purchase price was $600,000.00, as provided in paragraph 2 (11), and the land described in paragraph 7 (14), for which the purchase price was $150,000.00.[4] On payment of the purchase price, appellee was to receive a grant deed and title policy insuring merchantable title (paragraph 3) (12). Appellants refused to execute a deed, and the property has been conveyed to appellee by the clerk of the court (180). Appellee has not received a title policy.

Payments Under the Contract.

The purchase price was to be paid $25,000.00 down (paragraph 2) (11), and an additional payment of $25,000.00 at such time as the property described in paragraph 7 became a part of the contract (paragraph 7) (14). These payments were made. There was

4. Contrary to the statement in the footnote on page 3 of appellants' brief, appellee did not have an option to acquire this land in paragraph 7. On the failure of the government to exercise an option which it held for this land "purchaser promises to buy and seller promises to sell" (paragraph 7) (14), and the land became a part of the contract. Appellee was obligated to buy.

also to be paid on the purchase price monthly payments, on the 20th day of each month, in an amount equal to $5.00 per thousand (M) feet of logs removed from the property during the preceding calendar month (paragraph 2) (12). The contract also provided for minimum annual payments of $40,000.00 each, payable on May 15 of each year, (paragraph 2) (12) that is, to the extent that the aggregate monthly payments were less than $40,000.00 per year, the amount of such deficiency was payable on May 15 of each year.

The contract provided that no logging could be conducted, and no logs removed from the land, until a total of $65,000.00 had been paid, being the initial down payment of $25,000.00 and the first minimum annual payment of $40,000.00, payable May 15, 1947. For the first several years the total of the monthly payments did not equal $40,000.00, and there was therefore paid as the balance due of the minimum annual payment in 1948, $40,000.00, in 1949, $32,091.12, and in 1950, $20,412.49. Thereafter, for each year the monthly payments exceeded $40,000.00 a year. At the time of the filing of this action there had been paid on account of the purchase price a total of $585,859.97. These payments were: down payments and balance of minimum annual payments—$182,503.61, and monthly payments, computed at the rate of $5.00 per M feet of logs removed from the property—$403,356.36 (Finding 4) (155-6).

In any event, as provided in paragraph 2(f) (12), the total purchase price was to be paid by May 15, 1956. In conformance with the decree of the court below, the purchase price was paid in full on April 21, 1955.

The total purchase price of $750,000.00 was fixed. It was not dependent on the amount of timber on the land, or the amount of logs removed, or the amount of logs that could be removed. Appellants repeatedly refer to the monthly payments as payments for logs. They were not. The monthly payments were instalment payments on the contract, on the total purchase price of the land. The footage of logs removed during any month was merely the yardstick adopted by the parties for computing the amount of

each monthly payment. This was not a contract for the sale of logs. It was a contract for the sale of real property. Appellee, as purchaser, had possession of the property, and the right to its full use and enjoyment, and this included the cutting and removal of timber. The interest retained by seller, the bare legal title, was a security interest only. By measuring the monthly payments by the footage of logs removed, the security of the seller was protected. This is further borne out by the fact that on the basis of the cruise[5] of the timber on this property at the time of the execution of the agreement, the cruise on which purchaser made the agreement (528), the contract price of the timber was $3.88 per M (213). The monthly payments were fixed at $5.00 per M. As Mr. Ward testified, the purpose of this was to give the seller an additional margin of security (213), over and above the amounts of the down payments (213) and the minimum annual payments. The $5.00 per M was not the value placed on the logs, the contract value was $3.88 per M. The monthly payments at the rate of $5.00 per M were not payments for logs, they were payments on the total purchase price of the land.

The quantity of logs removed could not affect or change the total purchase price. It could not impair the security of appellants; they had already been paid $182,503.61 over and above payments for logs removed. Payments were made at the rate of $5.00 per M for all logs removed. For every thousand feet of logs removed, for which payment was made at the rate of $5.00, the security of seller was increased $1.12. Almost twenty-five per cent of each monthly payment made by purchaser represented additional security to seller, so that of the $403,356.36 paid on the basis of logs removed, almost $100,000.00 represented additional security to seller, and at the time the complaint was filed appellee had paid, on account of the purchase price, approximately $280,000.00 over and above the contract value of the logs removed.

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5. A cruise is an estimate, by an expert, of the quantity of lumber that may be recovered from standing trees, measured in units of 1000 feet (per M). Almost without exception, timber land is bought and sold on the basis of a cruise.

Reports Under the Contract.

Paragraph 11 of the contract (19), provides that purchaser was to supply to seller, with the monthly payments, monthly reports, including all hauling and scaling slips of purchaser's logging operations. The contract does not specify the form or procedure to be followed.

The property involved in this case has been commonly referred to as the "Ward Lands". The property adjacent to the Ward Lands has been commonly referred to as the "Sage Lands". Appellee is a corporation owned and controlled by the A. K. Wilson family. Coast Redwood Co., Inc. herein referred to as "Coast", was also a corporation of the A. K. Wilson family. Both appellee and Coast, by various agreements, were logging on both the Ward and the Sage lands, at the times here involved.

These lands are a mixed stand of principally Redwood and Fir, with some other species. On the Sage Lands the Fir timber was owned by two other independent corporations, California Barrel Co. and Arrow Mill Co. By agreement with those companies both appellee and Coast were logging the Fir timber on the Sage Lands along with the other species. As a consequence the logging operations being conducted were not controlled by property lines, but were rather dictated by the topography of the land and the location of the roads, in other words, both the Ward and Sage lands were being logged as a single tract. In some instances, from a single logging landing or setting[6] logs would be taken from both the Ward and Sage lands.

As each tree was felled and cut into logs, each log was branded as coming from either Ward or Sage lands. The logs were then loaded onto trucks, after which they were scaled, by a scaler[7] employed by appellee. At the time of making his scale, the scaler completed one or more scale slips in quadruplicate for each truck

6. A landing or setting is the place at which the logs are yarded, that is, brought to a central point, and loaded on trucks.

7. The scaler measures the footage of lumber that may be recovered from each log.

load of logs. The scale slips were serially numbered, in three separate classifications; logs removed by appellee or by Coast; logs removed from the Ward or Sage lands; and logs hauled over each of the two main access roads (319). Each copy of the scale slip was a different color. We are concerned here only with the white and pink copies. The scaler retained the white copies, which were accumulated and sent down to the office of either appellee or Coast, as the case might be. After delivery of the logs to the mill, the trucker returned the pink copy to the scaler in the woods, who accumulated them and sent them down to the office of appellee or Coast, as the case might be. From the scale slips it could be determined, as to each log, the land from which removed, the Section number, the number of the landing or setting at which logged, whether logged by appellee or Coast, the species, the total footage, the trucker hauling it, and the mill to which it was delivered. The scaler kept a daily record, cumulative by calendar week and by calendar month, of the total logs hauled from the woods (317), and indicating the totals from the Ward and Sage lands and the totals of the different species of timber. A copy of this record was delivered to a representative of appellant at the end of each week, for that week's operations, and appellants received these weekly, during all of the time here in question (403, 413).

At the end of the month the pink copies were sorted out by serial number, there often being as many as 500 to 600 a month. If any were missing, as was frequently the case (327), photostatic copies of the white copy were made and included with the pink copies (329). They were then bundled up and shipped to appellants. Appellee also prepared a monthly recapitulation of these scale slips, listing each scale slip by number, serially, and showing the section number, landing number and footage of each species removed. These monthly reports were sent to appellants. The monthly payments under the contract were made to appellants on the basis of these monthly recapitulations. Appellants, therefore, received currently, each week, a copy of the scaler's record. They also received the pink copies of the scale slips and the monthly recapitulation.

The Facts Upon Which Appellants Base the Right of Forfeiture.

Appellee made substantial payments under the contract for each of the months of June to October and December, 1953.[8] By mistake the payments did not cover the full amounts due. By mistake, appellee failed to pay the first instalment of real property taxes for the year 1953-54.

For the months of June to October, 1953, appellee paid the following amounts as instalments due on the purchase price: June—$12,544.21;[9] July—$7,358.25; August—$7,435.43; September—$5,544.12; October—$6,509.29. (Finding 6) (157).

Appellee failed to make payments on account of the purchase price, for each of these months as follows: June—$1,870.00; July—$6,795.00; August—$5,620.00; September—$9,155.00; October—$11,275.00 (Finding 7) (158).

The total payments for those months were $39,391.30. The total amounts unpaid were $34,715.00.

For the month of December, 1953, appellee paid to appellants the sum of $12,401.86. (Finding 6) (157). This payment was deficient in the sum of $1,281.87. The pink slips covering *all* logs removed during December were sent to appellants within the time provided in the contract. By letter appellants were advised[10] of the total quantity of logs removed in December. This was not in the form of the monthly recapitulation previously sent, but was a "report" within the meaning of paragraph 11 of the contract (19). Appellants had both the pink slips and the report at the time they accepted the payment of $12,401.86.

The pink slips and monthly recapitulations sent by appellee for each of the months June to October, 1953, did not include all

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8. For convenience, the parties have referred to the defaults as for the months of June to October and December, 1953. Under the contract the payments were not due until the twentieth day of each succeeding month.

9. Appellants' records, as shown by their exhibit "I", page 2 of the appendix to their brief, shows this payment as $12,544.36, a difference of fifteen cents.

10. Defendant's Exhibit "S".

of the logs removed during those months, to the extent of the deficiencies in payments for those months. However, during all of that time, appellants' representative, Harvey, received weekly from the scaler in the woods, an employee of appellee, reports which were cumulative for each calendar month, showing the total footage of logs removed, including the logs omitted from the monthly recapitulations and for which the pink slips had not been sent (403). Appellants had these reports prior to the receipt of the payments by appellee.

It is on the basis of these partial non-payments that appellants seek to forfeit the rights of appellee under the contract and in the land.

Appellants endeavor to make considerable point of the fact that over the history of the contract payments and reports were not made by the twentieth of the month. This is in no sense material in this case. Ward testified that up to the time of these defaults all payments had been made within the terms of the contract (222-3). Appellants had been policing the operations of appellee under the contract from the outset, (973) and had never before had occasion to question the accuracy of any report. Appellee was compelled, by circumstances beyond its control, to take full advantage of the provisions of the contract with respect to payment, but it had always made every payment due, and appellants knew that appellee would make every payment as called for by the contract.

The reports prepared by the scaler were delivered to appellants weekly. Every effort was made to forward the pink slips and monthly recapitulations by the twentieth of each month (313, 345). Appellee retained Paul Owens to handle the pink slips and monthly recapitulations and instructed him to send them out as soon as possible (515). Appellee was paying to get the job done, but it was not being done (613). Owens was very busy and understaffed (547-8, 313). The number of transactions was voluminous. The exact date on which they were sent for the months of June to October does not appear, but in any event it was within a day or two of the twentieth of each month, and no more than several days after the twentieth.

Payments were not made by the twentieth of the month, because the money was not available to make them (539). At the time of entering the contract appellants knew that the payments to be made under this contract would have to come from the logging operations (611). Appellants knew that appellee, through subsidiary corporations, was constructing a saw mill and a planing mill (580, 599) and was investing very heavily in the construction of roads on these and adjoining lands (539). Several of appellee's other enterprises were in serious financial distress (543). There had been a severe and costly forest fire on these lands in the previous fall, and during the previous winter there had been most severe and costly floods (580, 599). It was from necessity, not choice, that appellee took full advantage of the contract as to the time of payments. As Wilson testified, "We were on needles and pins all the time", because cash was not available (581).

SUMMARY OF THE ARGUMENT

I.

The trial court concluded that the conduct of appellee was wilful. It was not, and on this ground alone the judgment should be affirmed. When the partial payments were made, it was thought that they paid in full the instalments due, and if it had been known that any further payments were due they would have been paid. The taxes were not paid because it was thought that they had already been paid. In such circumstances, the failure to pay was not wilful.

II.

(A) Appellants, by accepting payment and asserting rights under the contract, with full knowledge of the defaults, have waived their right, if any, to assert a forfeiture.

(B) Appellants have not satisfied the conditions of the contract for declaring a forfeiture, in that no "written demand" for performance was made by appellants.

III.

(A) The provisions of paragraph 12 of the contract, giving to appellants the right to forfeit appellee's interests in the event of

default, are invalid under Civil Code § 1670, as attempting to fix the amount of damage or other compensation to be paid in anticipation of the breach.

(B) Paragraph 12, providing both for cancellation and recovery of unpaid instalments, is, by its terms, inconsistent and cannot be enforced.

(C) By asserting rights under the contract after the notice of cancellation, and by obtaining a writ of attachment, appellants have made an election of remedies and cannot now terminate the contract.

IV.

Even if the defaults of appellee were wilful, it was entitled to be relieved from forfeiture. The judgment from which appellants appeal did not reinstate appellee under the contract. The decree of strict foreclosure entered herein was a proper decree, and was within the sound discretion of the court of equity.

ARGUMENT

I.

The Conclusion of Wilfulness Is Contrary to the Evidence.

The trial court concluded that the failures of appellee to make the payments in strict conformance with the contract were wilful within the meaning of § 3275 of the Civil Code of the State of California.[11] Appellee has not appealed from the judgment, but the conclusion of the trial court of wilfulness cannot be supported. Appellants concede that if the defaults were not wilful their appeal is without merit. On that ground alone the judgment should be affirmed.

1. THE CIRCUMSTANCES FOR THE MONTHS OF JUNE TO OCTOBER, 1953.

The facts surrounding the partial defaults for the months of June to October are without dispute, and there is no contrary evidence.

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11. The code section is set out in full on page 16 of appellants' brief.

Under dates of July 21, 1953, August 21, 1953, September 22, 1953, October 21, 1953, and November 21, 1953, appellants notified appellee in writing of appellee's failure to report the quantity of logs removed during each of the months June to October, 1953, respectively, and the failure to make payments due on the twentieth day of each of the months of July to November.[12] In response to those written notices, and as payments of the instalments due, appelleee made reports and payments to appellants as set forth above at page 9. Each report and each payment was made in the belief and understanding and with the intention that it constituted performance in full for each of those months.

Wilson personally handled all payments to appellants (652). He was directly in charge of forwarding the pink slips and reports to appellants. He thought the payments made covered all logs removed during each of those months (545). He did not know that all logs were not being reported (546). He did not know that the payments were not on the basis of all logs removed (546). If he had known further payments were due, they would have been paid (581). He thought they were paying all that was owed, and he intended to pay on the basis of all logs removed (646). There is no contrary evidence, and there is nothing from which any different inference can be drawn.

For several years prior to June, 1953, Coast Redwood Co., Inc. (Coast) had conducted all logging on these lands. Owens was employed by Coast and supervised the handling of the pink slips and preparation of the monthly recapitulations. In January, 1953, Coast went into reorganization under Chapter XI of the Bankruptcy Act, and Owens left its employ and established offices at Arcata, California, as a public accountant. Thereafter, Owens continued to keep certain of the records of Coast, and continued to supervise the monthly recapitulations to appellants, not as an employee of Coast but as a public accountant, on a fee basis (306). At no time did Owens have any control or supervision over the

12. These "Default Notices" are attached to the cross-complaint of appellants, Exhibit "B", (54-61).

payments made to appellant (311). Wilson travelled a great deal and spent relatively little time in the Eureka area (544). The usual procedure followed was that Wilson would call Owens by telephone several days before a monthly payment was due and enquire of Owens the footage of logs removed during such month. Wilson would then compute the amount of the payment due on the basis of $5.00 per M feet, and would personally direct either his Portland or Los Angeles office to make the payment (540, 609).

In April of 1953, appellee, for the first time in several years, commenced logging operations for its own account in northern California (306, 536). At that time, Owens was retained, as a public accountant, to maintain certain records of the activities of appellee in northern California, on a fee basis (541).

The principal offices of appellee were, and are, in Portland, Oregon, and the permanent records of the company are maintained at Portland. At the time of his employment by appellee, Owens was instructed that he should maintain only such records as had to do with the receipt and disbursement of funds in the Eureka area, and that all other records of appellee would be maintained in Portland (307). Owens was not advised of the terms of the agreement with appellants (309), and was not advised as to what payments, if any, appellee was required to make to appellants, beyond his long standing instructions that he was to report each month directly to appellants, the total footage of logs removed from this property by Coast.

When appellee commenced logging operations in April, 1953, it was on land not covered by this agreement (536). The same procedure was followed with respect to this logging. Scale slips were made by the scaler. The white copies, and the pink copies after being returned by the truckers, were sent on to Owens. Shortly after Owens commenced receiving these scale slips, he requested of Wilson, in a telephone conversation, advice as to what he should do with them. He was advised that after he had completed the records that he was to maintain, and periodically,

the white slips should be forwarded to Portland, for the permanent records of appellee that were maintained at Portland (311). He was further advised, that inasmuch as no report or payment was to be made to any person on the basis of logs removed from the lands on which appellee was then logging, the pink copies of the scale slips should merely be stored for possible future reference. This was the procedure followed by Owens (311, 312, 542).

Late in June, 1953, appellee completed the logging of the land it had commenced logging in April, and shifted its logging operation to the Ward and Sage Lands (341). Owens received no different instructions from the original instructions in April (344), and therefore continued to periodically send the white copies of the scale slips to Portland and to store the pink copies for possible future reference (312). Wilson, of course, knew when appellee started logging on the Ward Lands. It did not occur to him that any further instructions were necessary to Owens, he assumed Owens knew that reports had to be made to appellants (546). Wilson was wrong in this assumption, but the assumption was based on the fact that Owens had been connected with the Wilson enterprises for many years. After appellee commenced logging on the Ward lands, Owens continued to send to appellants the pink copies of the scale slips covering logging conducted by Coast, and continued to make his monthly recapitulations, including only the logs removed by Coast. During this period Owens continued to store the pink slips covering the logging of appellee, and did not include in his monthly recapitulations to appellants the logs removed by appellee. The result therefore was that for these months only the logs removed by Coast were reported. The pink slips covering logs removed by appellee were not sent to appellants and these logs were not included in the monthly recapitulations. During all of this time, however, all logs removed, including the logs removed by appellee, were included in the cumulative weekly reports made by the scaler to Harvey, appellants' representative.

During this period the same procedure for making payments was followed. Wilson called Owens by telephone and asked him the footage of logs removed for each particular month (610). Owens reported only the logs removed by Coast. Wilson used the figure reported by Owens in computing the amount of the payment, and assumed that it included all logs removed, including those removed by appellee (545). The payments for each of the months June to October were, therefore, deficient by an amount equal to $5.00 per M feet for logs removed by appellee during each of those months.

There was nothing in the amounts reported by Owens to arouse Wilson's suspicions. The monthly payments for these five months were approximately in the same amounts as they had been in the past (654). Wilson knew that both Coast and appellee were logging on the Ward lands, but he also knew that at the same time and during all of this time both Coast and appellee were also logging on the Sage lands. Wilson knew, currently, the approximate total amount of logs removed by both Coast and appellee during each month, but he did not distinguish between logs removed from the Sage or Ward lands (651), and the payments to appellants were made 60 to 90 days later (652). During all of this time Wilson was very busily engaged in Los Angeles in connection with the reorganization proceedings of Coast (544). He did not receive copies of the monthly recapitulations (655) or the scalers' reports (319). He had to rely on reports received from Owens and others, most of which were by telephone. A mistake was made. The mistake resulted from a misunderstanding between Owens and Wilson. It was an innocent mistake.

Appellants endeavor to argue some element of fraud or wrongdoing on the part of appellee in failing to make these payments; that appellee was motivated by a desire to take logs without paying for them, and intended to deprive appellants of the payments. The arguments are wholly and completely without foundation or basis. The only evidence in the record is of an innocent mistake, and there is nothing in the record to the contrary.

In no circumstance could the failure of appellee to make these payments result in appellee acquiring something for nothing. It could not result in appellee acquiring logs for which it was not obligated to pay. This was not a contract for the purchase and sale of logs, it was a contract for the purchase and sale of real property. The total purchase price was fixed, and was not dependent upon the footage of logs removed. The footage of logs removed fixed only the time of payment, and the only possible effect of the failure to make the payments was to delay the time of payment. The only possible loss to appellants was the loss of the use of the money, a loss for which appellants could be, and were by the decree of the trial court, fully compensated by the payment of interest, not otherwise payable under the agreement.

Neither Wilson nor appellee had any actual knowledge that a mistake had been made. It is true they had the means of knowing, the records were there. But they had no superior knowledge to that of appellants. Appellants were fully advised currently of the total footage of logs removed from the Ward Lands, during each of these months.

Fletcher, one of the attorneys for appellants in this action, represented appellants, and generally supervised their interests in California, including this contract (192, 215). Since the date of the contract, May 1, 1946, appellants had employed someone to police the logging activities (973).

In August of 1952, Fletcher employed French, a timber cruiser (280) on behalf of appellants. French, at that time, was also employed by California Barrel Co. and Arrow Mill Co. French's employment in this connection was to check the logging operations on these lands, to see that the contracts were generally conformed with, to see that the logs were properly branded, to check the logs removed, to see that each of his employers received credit for the logs removed from the respective lands, and to generally supervise and police all of the operations on these properties (192, 282). Fleckner and Harvey were employed by French and appellants (210). Fleckner had direct supervision of these activities

(215, 416). He was familiar with the agreement involved in this action. His principal duty was to see that that agreement was conformed to by appellee (417). He was familiar with the land and the area (429). Harvey devoted himself exclusively to the policing of these lands (417). He was in the woods daily (392). He was thoroughly familiar with the property, he knew all of the roads, he knew the location of the property lines, he knew the location of each landing and setting, he knew the equipment that was being used in the logging operations, he daily checked the branding of the logs, and the logs that were being removed, he knew currently where logging operations were being conducted, he was in daily contact with the loggers and the truckers (392, 393), he knew and understood the serial numbering of the scale slips (406), he received weekly a copy of the scaler's record of the logs removed (405), which record was cumulative for each calendar month, he knew daily everything that was going on in the woods and the logs that were being removed. Harvey had always had full and complete cooperation from the men in the woods and had always received all information for which he asked (413). By the landing number appearing on the report received from the scaler each week he knew whether the logs had come from the Ward or Sage Lands (394), and if it was a mixed landing, he knew currently the quanitity of logs from either the Ward or Sage lands removed from that landing (404). He knew the day on which appellee commenced logging on these lands in June, 1953 (402).

Harvey maintained a daily diary of the logging operations and other activities on these properties. This diary was in detail, and included everything that happened, day by day. At the end of each month this daily diary was typed into report form, and a copy of this report was sent monthly to Ward and Fletcher (417). In addition, a monthly report was prepared, from the records obtained from the scalers and from other information obtained by Harvey, of the total logs removed. A copy of this report was sent monthly to Ward and Fletcher (417), by the 10th or 15th of each month (865). Ward and Fletcher received the reports currently and read

them (202, 861) and by letter Fletcher complimented French on the job that he was doing (875). The reports were very comprehensive and detailed.[13]

Both Ward and Fletcher had the French reports before they received the pink slips and monthly recapitulations from appellee (278). It was from the French reports that Fletcher first discovered the defaults (849, 850). It was from the French reports alone that Ward computed the total amount of the defaults for the months of June to October, inclusive, 1953 (272, 278), and his computation was within $285.00 of the amount found by the trial court to be due for those months. Appellants were as fully advised during all of this time as appellee.

In the circumstances, to suggest that appellee would wilfully default in these payments, is not understandable. Appellee would not jeopardize its rights in this property. The amount of the non-payments is a substantial sum, but compared to the present value of the property of in excess of $800,000.00, it is small indeed.[14] Appellee knew that appellants had a representative in the woods every day (654), and knew that appellants were fully and currently advised of all of the activities in the woods and of the total footage of logs removed (693). Appellee knew that if any payment required by the contract was not made appellants would know of it promptly, it could not possibly be hidden.

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13. The bound volume of these "French Reports" for the year 1953 was admitted in evidence as plaintiffs' exhibit 11. The exhibit cannot be conveniently printed as an appendix to this brief.

14. Appellee has paid in damages to appellants an amount approximately equal to the defaults. In addition, of course, the expense to appellee of this litigation has been very substantial. As the court said in *McCartney v. Campbell,* 114 W. Va. 332, 171 S.E. 821, 822, in holding that a default in payment by a vendee under an instalment contract was not wilful, "moreover, he has paid out in this litigation far more in witness fees and other costs than the amount of his arrears at the time defendant declared the contract forfeited. So we cannot doubt that his position in the matter of payments was assumed in good faith." The court also stated that for non-performance of a money obligation, where full compensation can be made, "relief ordinarily goes in equity as a matter of course, . . ."

2. THE CIRCUMSTANCES FOR THE MONTH OF DECEMBER, 1953.

The partial default for December is of a different nature. The pink slips covering all logs removed during December were sent to appellants. By letter, the total logs removed had been reported. The payment made for December was in the amount of $12,401.86, which was short by the sum of $1,281.87. This default was obviously merely an error in mathematical computation. It is the same kind of error as had occurred previously on a number of occasions over the life of the contract. In each of those past instances, appellants had notified appellee of the deficiency, and it was paid (see page 34 below). In this instance, appellants on April 15, 1954, demanded an additional payment for December in the amount of $2,364.49. This amount was not payable. After the notice of cancellation, appellants reduced this demand to $1,281.87, which was tendered to appellants on May 21, 1954, but they refused to accept it. In any circumstance it certainly cannot be claimed that this default was wilful.

3. THE CIRCUMSTANCES AS TO TAXES.

The first instalment of taxes for 1953-54 were not paid. It is questionable, in any circumstance, if this is such a default as would justify the cancellation of the agreement. Paragraph 4 of the contract (p. 13) provides:

"Purchaser agrees to pay *for his own account,* * * *"

real property taxes. This provision of the agreement recognizes that purchaser is the owner of the land. Obviously the provision is intended only to protect the security of appellants as vendor.

On October 19, 1953, appellants gave to appellee a notice of default for the non-payment of certain other real property taxes. On December 29, 1953, ten days after the sixty day period provided for in paragraph 12 had expired, Fletcher determined that these other taxes had not been paid and telephoned E. V. Mills, attorney for appellee. Mills stated that he was certain it was merely an oversight and that the matter would be taken care of

immediately. Mills contacted Wilson by telephone and these taxes were paid on that same day, December 29, 1953 (834-5). The notice of default with respect to the present claim of failure to pay taxes was sent out on that same day, December 29, 1953 (Exhibit C to Cross-Complaint (63)). When Wilson paid the taxes as to which Mills had called him, he assumed that that payment paid all taxes then due against the property (583-4). On receipt of the notice of default dated December 29, 1953, the day on which the taxes had been paid, he assumed merely that the notice of default had been sent out prior to the payment made on that day, and that the default had been cured (637). The default was the result of error. It was not intentional. Appellants knew that if the matter had been called to the attention of appellee, the taxes would have been paid, as they had been on December 29, 1953.

4. THE DEFAULTS WERE NOT WILFUL WITHIN THE MEANING OF CIVIL CODE § 3275.

The term "wilful" as used in the statute means a voluntary, conscious act, "intending the result which actually comes to pass; designed; intentional;" (*Parsons v. Smilie,* 97 Cal. 647, 655, 32 Pac. 702). The court in the *Parsons Case* points out that if the default is merely the non-payment of money, for which adequate compensation can be made, the court will generally not enquire whether or not the default was wilful, but will grant relief, as matter of right. In every case in which the default in the payment of money has been found to be wilful, there is some further element beyond the mere non-payment, something to show a repudiation, abandonment, or denial of the contract. So in *Freedman v. The Rector,* 37 C2d 16, 230 P2d 629, the vendee not only defaulted in a payment, he repudiated the contract. In *Crowell v. City of Riverside,* 26 CA2d 566, 80 P2d 120, in finding the breach of a condition of a lease against subletting to be wilful, the court points out that the breach is not the mere failure to pay money for which exact compensation could be made.

In *Wilson v. Security-First National Bank,* 84 CA2d 427, 190 P2d 975, a default in the payment of money under a land contract was found to be wilful on the basis that the vendee stated at the time of the default that he did not pay "because I didn't want the property." In *Fowler v. Vaughan,* 86 CA2d 772, 195 P2d 441, a default in the payment of an instalment under a contract was found to be wilful because the plaintiff not merely failed to pay, he refused to pay and denied that the vendor had any rights in the property.

The Restatement of Contracts § 357, as shown in the Comments to that section, approved by the court in *Barkis v. Scott,* 34 C2d 116, 208 P2d 367, provides that it is not wilful if the default is the result of negligence, error of judgment, mistake of fact or law, insolvency or hardship.

Appellants will urge that the defaults occurred on the twentieth day of each month, the day provided in the contract for the making of the monthly payments. It is true that the payments were knowingly not made on those days. That is not sufficient to make the default wilful. In most instances the payments could not be made by the twentieth of the month because the accounting work necessary to compute the amount of the payment was not completed. Furthermore, as Wilson testified, payments were not made sooner because the funds were not available. This is not a wilful default (Restatement of Contracts § 357; *Barkis v. Scott,* 34 C2d 116, 208 P2d 367).

In any circumstance, the failure to pay on the twentieth of the month was not "intending the result which actually comes to pass" (*Parsons v. Smilie,* 97 Cal. 647, 655, 32 Pac. 702), that is, the failure to pay an amount due under the contract. By the terms of the contract appellee had a period of sixty days after demand within which to perform. Because funds were not available it was necessary that appellee utilize that sixty day period. The intention of appellee was not to fail to pay under the contract, but to pay within the terms of the contract.

If it is to be considered that the defaults occurred, not on the twentieth of each month, but rather on the date that the partial

payments were made, the default was in failing to make the full payment. Wilson testified that at the time the payments were made it was intended that the payments be based on the total footage of logs removed during the respective months. **It was intended that the payments be made in full. Neither Wilson nor any other representative of appellee knew that the payments were not in full.**

With respect to the taxes, Wilson testified that he assumed the default notice had been sent out in ignorance of the payment of taxes that had been made on the same day. **He thought the taxes had been paid.**

In *Barkis v. Scott,* 34 C2d 116, 208 P2d 367, the defaults occurred by the refusal of a bank to honor checks of the vendee because of insufficient funds. The trial court found the default to be wilful. The Supreme Court reversed this finding. The vendee testified that he did not know that there were not sufficient funds in the bank to cover the checks drawn. On the testimony of the vendee alone, that he thought there were sufficient funds in the bank, the court held that the defaults were not wilful within the meaning of § 3275 of the Civil Code.

Appellants argue that in February, 1954, appellee knew, or should have known of the defaults, but did nothing. In the *Barkis Case,* the vendor urged as a ground for supporting the finding of wilfulness that the vendee must have noticed, on receiving his bank statement at the end of the month, that the check to vendor had not been cancelled and that the bank had made a charge for an overdraft. The court points out that the question of wilfulness has to do with the time of the default and not with some subsequent time when the defaulting party learns, or should have learned, of the default. Nor is it concerned with what the defaulting party did or should have done after learning of the default.

On February 11, 1954, Fletcher called Owens by telephone and stated that French would like to examine the records. Owens said "that's fine" (854). Owens told Fletcher he would be glad to show them (315). Owens reported this conversation to Wilson and Wilson told Owens to show French any records that he wanted to see (547, 647).

On February 17 or 18, 1954, French and Fleckner went to the offices of Coast, and requested to see the Coast records. They were immediately made available to them (285, 419). Fleckner checked the amounts reported by appellee for the months of June to October against the records of Coast, showing the logs removed by Coast during that period, and the two were exactly the same (420). He also checked the Coast records against the French reports as to the quantities removed by Coast and found that they were identical (420). Both French (286) and Fleckner (420) knew that appellee had removed logs during each of those months. From that single inspection of the Coast records, and from their own records, they were fully advised as to the defaults, and the amounts still owing (285, 420). This was immediately reported to Fletcher (291).

On February 21 or 22 French went to Owens' office. There was no one else present. At that time French asked to see appellee's records showing the footage of logs removed (315, 288). Owens advised French that he did not have such records, that they were maintained in Portland. He further told French that either the records could be inspected in Portland or they would be sent to Eureka, whichever French desired (289, 315). Wilson had told Owens to tell French that the records could be inspected in Portland or would be sent to Eureka, whichever he preferred (647). French told Owens that he would contact him within a week with respect to the records of appellee, and whether or not he desired that they be sent to Eureka (290, 316).

Appellants, in their brief, accuse Owens of perjury, and accuse appellee of endeavoring to conceal the true facts (which were fully known to appellants at that time), by telling French that the records of appellee were in Portland. The records were in Portland.

Owens was not, as stated in appellants' brief at page 39, appellee's "Arcata bookkeeper". He was an independent public accountant, employed on a fee basis (541). The only records Owens had of the nature requested by French were his own work

records as a public accountant. Neither appellee nor Wilson knew that he had even those records (373). He would not be justified in showing them to French when the official records of the corporation could be made so easily available, and within a matter of several days.[15] The only evidence is of a complete willingness to make the records available to appellants. They had only to request them.

Wilson was satisfied that the investigation by French would disclose any defaults there might be, and if any amount was found to be owing it would be paid (549). He so advised French (549). Neither Wilson nor appellee heard anything further from appellants in connection with this matter until receipt of the notice of cancellation on May 12, 1954. French did not come back as he stated he would (291). French had no further contact with Owens or appellee and no further request was ever made to see the records (291, 316). As time went on Wilson assumed that appellants had satisfied themselves that there was no default (549-550). He thought, in any circumstance, that under the contract, if there was a default, written demand for payment would have to be made (550). In any event, he felt that in fair dealing and in line with the past history under the agreement, that if appellants claimed any default they would advise him.

On the basis of *Barkis v. Scott,* supra, the conclusion of the trial court that the defaults by appellee were wilful within the meaning of Civil Code § 3275 cannot be supported. On that ground alone the judgment should be affirmed.[16]

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15. The claim of appellants is based on copies of records that Rank obtained from Owens on March 24, 1954, more than a month after French's visit. These were Owens' work records (368). Rank and Owens have known each other for a long time, and have always been very friendly (357). Neither Rank nor appellants ever made any request at any time of Wilson or appellee to examine any of the records of appellee.

16. Even on appellants' theory, from Rank's "testimony" in his cross-examination of Owens, that in February, 1954, Wilson instructed Owens not to report the logs removed by appellee during the months of June to October, 1953, because he couldn't pay for them at that time (376), the defaults, if that would constitute a default, would not be wilful (Restatement of Contracts § 357; *Barkis v. Scott,* supra).

II.

A. Appellants, by Accepting Payment and Asserting Rights Under the Contract, Have Waived Their Right, if Any, to Declare a Forfeiture.

The law abhors a forfeiture. It is very ready to find a waiver of the right to forfeit. The waiver may arise from the acts and conduct of the parties. Any acts evidencing an affirmance of the contract, after the right to forfeit has arisen, will constitute a waiver. The acceptance of any benefit or the assertion of any right under the contract, after the default giving the right to forfeit, will constitute a waiver.

In *Talbot v. Gadia,* 123 CA 2d 712, 267 P2d, 436 the Court said at page 719:

> "The law looks with disfavor upon forfeitures, and evidence tending to show a waiver of a forfeiture will be favorably regarded, and the forfeiture will be avoided upon any reasonable showing. The amount of evidence required to establish a forfeiture is much greater than that required to establish a waiver, and the waiver may be implied from the acts and conduct of the parties."

Evidence tending to show a waiver will be looked upon with "kindly eyes", and the court will place a liberal construction on the acts of the parties to find the waiver (*Miller v. Modern Motor Co.,* 107 Cal. App. 38, 290 Pac. 122; *Laffoon v. Collins,* 212 Cal. 750, 300 Pac. 808; *Redd v. Garford Motor Truck Co., Inc.,* 205 Cal. 245, 270 Pac. 447; *Gonzalez v. Hirose,* 33 C2d 213, 200 P2d 793).

Every intendment and presumption is against the person seeking to enforce a forfeiture (*Savings and Loan Society v. McKoon,* 120 Cal. 177, 52 Pac. 305). The party seeking to assert the forfeiture has the burden of proof as to all necessary elements, and as to the performance by him of all conditions to the exercise of the right (*Universal Sales Corp. v. Cal. Etc. Manufacturing Co.,* 20 C2d 751, 128 P2d 665; *Wagner v. Shapona,* 123 CA 2d 451, 267 P2d 378; *Callahan v. James,* 141 Cal. 291, 74 Pac. 853). In each of

the cases hereafter cited, time was expressly declared to be of the essence, and the right to declare a forfeiture for default was given by the contract. To sustain a waiver, the character of the default as wilful or otherwise, is immaterial (*Barkis v. Scott,* 34 C2d 116, 208 P2d 367).

For each of the months June to October and December, 1953, payments were due on the twentieth day of the succeeding month. For each of those months appellants gave written "notice of default." For each of those months, appellee, within the 60 day period, tendered as payment in full of the instalment due, and in full satisfaction of the default referred to in the notice, and appellants accepted and retained, unconditionally, payments as follows: September 23, 1953—$12,544.36, October 21, 1953—$7,358.25, November 24, 1953—$7,435.43, December 16, 1953—$5,544.12, January 21, 1954—$6,509.29, March 27, 1954—$12,401.86. The acceptance of these payments, without more, under the authorities hereafter cited, constituted a waiver of the right to terminate the contract. At the time of the receipt by appellants of such payments, appellants had full and complete information as to the total quantity of logs that had been removed and as to the total amount due for each of such instalment payments.[17] The "notice of default" with respect to taxes was given on December 29, 1953, and the 60 day period expired February 27, 1954. No other demand, request or notice was ever made or given by appellants to appellee for any further performance for any of those months, until after the notice of cancellation of the contract (216, 270).[18] At no time did appellants make any claim of any deficiency in performance by appellee for those months, until after the notice of cancellation of the contract.

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17. See discussion at page 17 above. Prior to receipt of the payment for December, 1953, appellants had received all of the pink copies and a report of the total quantity of logs removed.

18. With the exception that, on April 15, 1954, appellants requested of appellee the sum of $2,364.49, claimed still to be due for the month of December, 1953. This amount was not payable.

Prior to receipt of the payment received on January 21, 1954, for the month of October, Fletcher, from the French report, knew that the payment should be in the approximate amount of $14,000 to $15,000 (849). The payment was $6,509.29. On January 29, 1954, Fletcher wrote to French seeking an explanation of this discrepancy (852). He did not contact appellee. On January 31, 1954, French wrote to Fletcher confirming that there was a deficiency in the payments for the months of June to October (852). On February 18, 1954, French and Fleckner examined the Coast records, and positively confirmed that the logs removed by appellee during the months of June to October had not been reported, and the payments made for those months were deficient and they knew the amount of the deficiency (285, 286, 420). This was immediately reported to Fletcher (291). On March 8 or 9, Fletcher made a full report to Ward, and at that time he knew, without question of the deficiencies (216). On March 19, Fletcher met with Ward and made a full report (218).[19]

With that knowledge, appellants accepted, on February 17, 1954, payment for the month of November, 1953, in the amount of $10,302.13. On March 27, 1954, appellants accepted payment under the contract in the amount of $12,401.86. On April 2, 1954, appellants gave to appellee "notice of default," and asserted rights to performance under the contract. On April 15, 1954, appellants made further demand on appellee for the sum of $2,364.49, claimed to be due, under the contract, for the month of December, 1953. On April 21, 1954, appellants gave to appellee a "notice of default", under the contract, for the payment due on April 20, 1954. Up until April 21, 1954, appellants continued to assert rights under the contract, and continued to treat it as a subsisting agreement. No further communication of any kind was had between the parties until May 12, 1954, when appellants served on appellee their notice of cancellation. There can be no

19. The issue of waiver was raised on the trial (395). There is no finding as to when appellants acquired knowledge of the defaults, but the evidence is undisputed, and comes from Ward and appellants' agents.

question that the conduct of appellants waived the provision of the contract that time was of the essence, and the right to cancel the contract, for all defaults which accrued prior to April 21, 1954. We are not concerned here with the more difficult problem of finding a waiver of the time provision with respect to subsequent or future payments or defaults, because there were none.

The leading case in California is *Boone v. Templeman,* 158 Cal. 290, 110 Pac. 947. The vendee, in possession, sued for specific performance of an instalment contract for the sale of land. The vendor asserted a forfeiture for failure to make payments when due. The vendor had accepted payments under the contract, and at the time of accepting the last payment made, the vendee was still in substantial default. The court held that there could be no question that by the acceptance of this last payment the vendor had waived the time provision of the contract and the right to forfeit for any and all defaults which had accrued to the time of that payment, and the court said at page 294:

> "The general rule on the subject is thus stated by Mr. Pomeroy: 'A condition that the title shall be made, or the price shall be paid, on or before a day named may be waived by the party entitled to performance; and if such party thus waives the exact performance at the day, or if he goes on treating the agreement as still binding after default has been made, he cannot afterwards turn around and set up the delay or default as creating a forfeiture, and therefore, a defense.' (Pomeroy on Contracts, sec. 337.)
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> " 'The one entitled to insist upon a punctual performance by the other or else that the agreement be ended, may waive his right and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly or by his conduct; and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting, and not ended by the other party's default.' (Pomeroy on Contracts, sec. 294.)
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> * * * * * * *
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> "These authorities make it clear that the acceptance of payments of installments on the price by Templeman, without objection long after they had become due, was a waiver of

> all breaches which had ocurred at or prior to the time such payments were actually made, and that he could not afterwards insist upon a forfeiture on account thereof. On April 24, 1903, when the last payment was made, after crediting that payment, there still remained due and unpaid the two installments for March and April of that year, and all the interest accrued to that date. As to these breaches the forfeiture was waived. The respondent does not seriously dispute this."

The court went on to hold, in the circumstances of that case, that the conduct of the vendor constituted a waiver not only of defaults accruing to the date of the last payment, but also with respect to future payments and defaults. We are not concerned with that problem here.

Webber v. Herbert, 46 Cal. App. 83, 188 Pac. 819 (Hearing denied by Supreme Court) was an action by a vendor to quiet his title. There was an instalment contract for the sale of land, under which the vendee was bound to pay taxes. The contract provided that time was of the essence and for forfeiture in the event of default. A default in payment occurred, and after that time the vendor demanded of vendee that he pay taxes. It was held that this constituted a waiver of the right to declare a forfeiture, and the court said at page 85:

> "Neither serious consideration nor citation of authority is necessary to support the conclusion that no party to a contract can insist on the performance of a current condition, such as the payment of taxes, and thereafter repudiate the contract for a prior breach of which he must have known. A court of equity does not permit parties who seek its aid thus to blow hot and cold."

The court went on to state that the rules were so well established that this appeal by the vendor was frivolous, and assessed damages against the vendor for the appeal in the sum of $250.00.

Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 6 P2d 71, was an action to forfeit an oil lease. Lessee agreed to drill certain wells, which he failed to do. The lessor nevertheless

continued to accept royalty payments. The court held this was a waiver of the right of forfeiture and said at page 440:

> "The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general rule and is supported by ample authority. [citing cases] The Rule is also stated in Ruling Case Law as follows: 'The most familiar instance of the waiver of the forfeiture of a lease arises from the acceptance of rent by the landlord after condition broken, and it is a universal rule that if the landlord accepts rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease for which a forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot afterward be asserted for that particular breach or any other breach which occurred prior to the acceptance of the rent. In other words, the acceptance by a landlord of the rents, with full knowledge of a breach in the conditions of the lease, and of all of the circumstances, is an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease, and demanding a forfeiture thereof.' "[20]

Goold v. Singh, 88 Cal. App. 339, 263 Pac. 548 was an action by a vendor to quiet his title on the basis of a forfeiture. Under the contract the vendee had the right to subdivide and sell parts of the land, with the provision that he account to the vendor, and pay to the vendor a part of the monies received, to apply on the purchase price, (as in our case appellee had the right to remove logs and the obligation to make payments on the purchase price on the basis of the logs removed). The vendee sold some of the

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20. The court also said, at page 445, "the theory upon which the courts hold that acceptance of rent, after breach of the covenants of the lease with knowledge of all the facts surrounding said breach, constitutes a waiver of such breach is that by accepting the rent under these circumstances the lessor recognizes the existence of the lease, and that it is inconsistent and not permissible for a party to recognize the existence of a lease and accept benefits under it, and at the same time claim that it is forfeited and seek to recover the fruits of a forfeiture."

land, but failed to account or make any payment to vendor. Subsequently the vendor accepted a payment of interest under the contract. The court found that at the time the interest payment was accepted, the vendor had no knowledge of the prior breach, and therefore found that there was no waiver. The court states, however, that if at the time of acceptance of the payment of interest the vendor had known of the prior breach it would have constituted a waiver.

Miller v. Reidy, 85 Cal. App. 757, 260 Pac. 358 (Hearing by Supreme Court denied), was an action to forfeit a lease for an assignment by a lessee without the consent of the lessor, contrary to the terms of the lease. The court held that the acceptance of rent after the breach waived the right of forfeiture. The receipt given by lessor on acceptance of the rent recited that it was without waiving any of the rights of lessor. The court held that this was without effect to prevent the waiver, and in fact merely evidenced the intention of the lessor to continue to assert rights under the lease and to treat it as a subsisting agreement.[21]

The acceptance of a payment under the contract, without more, was held to have waived the right to declare a forfeiture for any default occurring prior to the date of such payment in each of the following cases:

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21. In *Rogers, Etc. Co. v. S. California Etc. Co.,* 159 Cal. 735, 115 Pac. 934, it was held that the vendor by agreeing to pay the vendee $1,500.00 for his interest under the contract waived his right to declare a forfeiture.

In *Scott v. California Farming Co.,* 4 CA 2d 232, 40 P2d 580, it was held that the vendor waived his right to forfeit by negotiating with the vendee as to the default and by taking an assignment of the vendee's interest under the contract.

Chin Ott Wong v. Title Insurance & Trust Co., 89 CA 2d 183, 200 P2d 541 (hearing denied by Supreme Court), was an action by the vendor to recover monies paid into escrow by the vendee, on a forfeiture. The final payment was to be made by May 29, 1946, but on July 15, 1946, when the payment had not been made, the parties amended the escrow instructions. It was held that by treating the contract as alive and subsisting the vendor had waived his right to forfeiture.

In *Boden v. Friedman,* 90 CA 2d 225, 202 P2d 632, prior to the time that all instalments were due, the parties negotiated for the payment of the full purchase price. It was held that this constituted a waiver.

Gonzalez v. Hirose, 33 C2d 213, 200 P2d 793;
Hoppin v. Munsey, 185 Cal. 678, 198 Pac. 398;
Hermosa Beach Etc. Co. v. Law Credit Co., 175 Cal. 493, 166 Pac. 22;
Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751;
Hayt v. Bentel, 164 Cal. 680, 130 Pac. 432;
McGlynn v. Moore, 25 Cal. 384;
McLane v. Van Eaton, 60 CA 2d 612, 141 P2d 783;
Leballister v. Morris, 59 Cal. App. 699, 211 Pac. 851;
LaChance v. Brown, 41 Cal. App. 500, 183 Pac. 216.[22]

On February 22, 1954, French met with Owens, and stated that he would be in further touch with Owens within the week. Expecting that French would be back and that the matter would be fully investigated jointly to determine if there had been a default, appellee did nothing. Neither French nor any other representative of appellants ever contacted appellee again with respect to this matter but rather continued to treat the contract as subsisting and in full effect.

Rather than contact appellee, appellants concealed their intentions. This is obvious from French's failure to further contact Owens or appellee. It is clear from the letter of April 26, 1954, from Rank to French (part of plaintiff's Exhibit 10) in which Rank directed French "* * * just go on as you have been without saying anything to anybody about our thinking." In a letter dated April 30, 1954, from French to Rank (part of plaintiff's Exhibit 10), French advised "* * * due to the recent developments, we

22. Similarly, if a party to a contract has a right to rescind, for fraud or otherwise, he must act promptly, and any delay, or any act affirming the contract or treating it as subsisting and in effect, or asserting rights under it, will waive the right to rescind. *Neet v. Holmes,* 25 C2d 447, 154 P2d 854; *Wilson v. Beazley,* 186 Cal. 437, 199 Pac. 772; *Bancroft v. Woodward,* 183 Cal. 99, 190 Pac. 445; *Estate of Warner,* 168 Cal. 771, 145 Pac. 504; *Cross v. Mayo,* 167 Cal. 594, 140 Pac. 283; *Ruhl v. Mott,* 120 Cal. 668, 53 Pac. 304; *Marten v. Burns Wine Co. et al.,* 99 Cal. 355, 33 Pac. 1107; *Bailey v. Fox,* 78 Cal. 389, 20 Pac. 868; *LeClercq v. Michael,* 88 CA 2d 700, 199 P2d 343; *Bryan v. Baymiller,* 95 Cal. App. 481, 272 Pac. 1106; *Bernard v. Sloan,* 2 Cal. App. 737, 84 Pac. 232.

have tried not to be conspicuous in the nature of some information."

Over the history of the contract if appellants claimed a deficiency in a payment for a particular month, appellee would make the payment without dispute.[23]

As Fletcher testified (832-835), on December 29, 1953, 10 days after the 60 day period had expired, he called Mills and Mills called Wilson respecting certain taxes. The taxes were paid that day.

Certainly appellee could expect that this practice would be followed. In the circumstances appellants are now estopped to assert a forfeiture on the basis of those defaults. *Giberson v. Fink,* 28 Cal. App. 25, 151 Pac. 371; *City of Los Angeles v. Krutz,* 170 Cal. 344, 149 Pac. 580, and cases above cited.

(B) Appellants Have Not Satisfied the Conditions of the Contract for Declaring a Forfeiture, in that No "Written Demand" for Performance Was Made by Appellants.

The notices on which appellants based their right to declare a forfeiture were insufficient under the contract. By the terms of paragraph 12 (21) the right of appellants to declare a forfeiture is conditioned on the failure of appellee to perform for a period of sixty days "after written demand by seller for such payment or performance, * * *". The only "written demand" by appellants were the so-called "notices of default", copies of which are attached to appellants' cross-complaint (54-63). Each of the notices is very general in terms, and the notices for the months of June to October and December, 1953, are identical. The notices merely advise appellee that appellants had not received performance and notify appellee of its default under specified paragraphs of the contract. They do not give notice of the particulars

23. As appears from defendant's exhibit "I" set out in full at pages 1 and 2 of the appendix to appellants' opening brief, such payments were made, after request, on October 19, 1951, June 4, 1952, September 8, 1952, January 19, 1953, May 5, 1953, October 6, 1953 and October 6, 1953.

of the default, or the amount to be paid. They are not a demand for performance, and don't even request the performance. With respect to taxes, appellants were at least as well advised as appellee as to the amount due, the land was assessed to appellants and they received the tax bills. With respect to the defaults for the months of June to October and December, 1953, appellants had the information, and certainly were fully advised prior to the notice of cancellation. For the months of June to October and December appellee rendered some performance, and made some payments, which were accepted and retained by appellants. No further or other demand or notice was made.

Forfeitures are never favored by the courts and every intendment and presumption is against the person seeking to enforce a forfeiture. (Civil Code, § 1442; *Savings and Loan Society v. McKoon,* 120 Cal. 177, 52 Pac. 305.) The person seeking to enforce a forfeiture has the burden of proving every essential element to the right, and full and strict compliance with any and all conditions to the assertion of the right. (*Callahan v. James,* 141 Cal. 291, 74 Pac. 853; *Wagner v. Shapona,* 123 CA2d 451, 267 P2d 378).

If an agreement can be reasonably interpreted so as to avoid a forfeiture, it is the duty of the court to avoid it.[24]

Jameson v. Chanslor-Canfield M. Oil Co., 176 Cal. 1, 167 Pac. 369, was an action to terminate a lease. It was argued by lessor that the only purpose of the notice or demand was to give the lessee the information. The court rejected this argument and stated, at page 6:

> "But the contract measures the rights of the parties in this respect, and, being a contract regarding a forfeiture and to

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24. "A contract is not to be construed to provide a forfeiture unless no other interpretation is reasonably possible." (*Universal Sales Corp. v. Cal. Etc. Manufacturing Co.,* 20 C2d 751, 771, 128 P2d 665.)

"* * * the construction which avoids forfeiture must be made if it is at all possible." (*Ballard v. McCallum,* 15 C2d 439, 444, 101 P2d 692.)

"He who claims a forfeiture must have closed every avenue of escape to his opponent." (*Miller v. Reidy,* 85 Cal. App. 757, 761, 260 Pac. 358, hearing denied by Supreme Court.)

> be strictly construed, its requirements must be fully met before the right depending thereon can be complete."

It was also argued in that case that the strict compliance with the notice and demand had been waived by the prior conduct of the parties. The court also rejected this argument and held, at page 8, where the language of the contract is clear it cannot be varied by the subsequent conduct of the parties.

To the same effect are *Flagg v. Andrew Williams Stores, Inc.*, 127 CA2d 165, 273 P2d 294, and *Wagner v. Shapona,* 123 CA2d 451, 267 P2d 378.

A demand on which a forfeiture may be based must be definite and specific (*La Chance v. Brown,* 41 Cal. App. 500, 183 Pac. 216; *Boone v. Templeman,* 158 Cal. 290, 110 Pac. 947), and must specify the amount payable to satisfy the demand (*McGlynn v. Moore,* 25 Cal. 384).

It is submitted that the "notices of default", particularly in the light of the partial performance rendered, and accepted and retained by appellants, were not sufficient under the contract to declare a forfeiture.

III.

(A) Paragraph 12 of the Contract Is Invalid Under Civil Code § 1670.

Paragraph 12 (21) provides that on default seller shall have the right to cancel the contract, resume possession of the property, retain all payments made and recover the sum of $5.00 per M for all timber cut and removed prior to the time that seller regains possession.

Section 1670 of the Civil Code of the State of California provides:

> "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

Paragraph 12 of the contract is an effort to fix "the amount of damage to be paid, or other compensation to be made, for a breach" of the contract, and falls squarely within § 1670.

The remedies available under a contract are fixed by the Civil Code. In certain circumstances there could be a right of rescission (Civil Code §§ 3406-3408), which results in a complete abrogation of the contract. After rescission, the relationship of the parties is as though the contract had not been made, and both parties must be put into the positions they would have been in, if the contract had not been made. If this is not possible the remedy is not available. Appellants did not rescind, rather they are seeking to enforce the contract.

The alternative remedy to rescission is for damages, (Civil Code §§ 3300-3320) which is based on the promised performance. The damages are substituted for performance (*Caughlin v. Blair,* 41 C2d 587, 262 P2d 305). Specific performance (Civil Code §§ 3384-3395) and termination and retention of amounts paid, when available as remedies are, of course, merely substitutes for money damages.

Section 3300 of the Civil Code provides the measure of damages for the breach of a contractual obligation "* * * is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."[25]

Civil Code § 3302 provides the "detriment" for the breach of an obligation to pay money is the amount due with interest.[25] In the case of the breach of an agreement to buy real property, the

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25. Civil Code § 3300:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

Civil Code § 3302:

"The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon."

"detriment" referred to in § 3300 is the excess of the amount due under the contract over the value of the property as of the time of the breach (Civil Code §3307).[26] If the value of the property has not changed, or has increased, there is no damage to the vendor, except possibly expenses incurred because of the breach (*Royer v. Carter,* 37 C2d 544, 233 P2d 539; *Freedman v. The Rector,* 37 C2d 16, 230 P2d 629).

The general provisions of the Civil Code respecting remedies are set out in §§ 3353 to 3370. The theory of the law in providing a remedy for the breach of a contractual obligation is to give to the non-defaulting party the benefit of his bargain, that is, what he would have received if the contract had been performed. He is not entitled to any more than this, whether the relief sought is termination and retention of amounts paid, specific performance or damages. There is no element of penalty or punishment for breach of contract, and the motive of the defaulting party, whether it be fraudulent, malicious or otherwise is immaterial (*Baumgarten v. Alliance Assurance Co.* (N.D. Cal.) 159 Fed. 275).

Section 3358 of the Civil Code provides:

> "Notwithstanding the provisions of this Chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the Articles on Exemplary Damages and Penal Damages, and in Sections 3319, 3339, and 3340."[27]

Caughlin v. Blair, 41 C2d 587, 262 P2d 305 was an action for damages under a contract for the sale of land. The court said at page 603:

> "Damages are awarded in an action for breach of contract to give the injured party the benefit of his bargain and

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26. Civil Code § 3307:
"The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him."

27. None of the exceptions are applicable to this case.

> insofar as possible to place him in the same position he would have been in had the promisor performed the contract."

Royer v. Carter, 37 C2d 544, 233 P2d 539, was an action by a vendor to recover expenses incurred. By acquiescence of the vendee, the vendor had repossessed the property and resold it. The expenses here sought to be recovered were in connection with the escrow that had been established. The court held that the purpose of the law in providing a remedy for breach of contract was to give to the non-defaulting party the benefit of his bargain. It was found that the expenses sought to be recovered would have been incurred even if the contract had been performed, and the court therefore, denied recovery to the vendor and said at page 550:

> "To do so would place the vendor in a better position than he would have been in had there been no breach."

In *Johnson v. Hinkel,* 29 Cal. App. 78, 154 Pac. 487, an action for breach of a lease, the court said at page 84:

> "It is a fundamental rule of law that courts will not, except where exemplary damages are given, allow a party to a contract, to recover upon its breach more than he would have received by its due performance."

Anything that a vendor receives on the breach of contract by vendee, over and above the "detriment" actually sustained, or beyond the benefit of his bargain, or in addition to what he would have received had the contract been fully performed, is to that extent a penalty and forfeiture against the vendee, and will not be enforced.

Section 3359 of the Civil Code provides as follows:

> "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

Section 3369, subsection 1 provides as follows:

> "Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition."

If the vendor has security for the performance of the vendee, he, of course, has remedies to enforce that security. This does not change the basic fundamental rule, however, that in no event is he entitled to any more than he would have received had the contract been fully performed. He is entitled to the "benefit of his bargain", but he is not entitled to more. So if he has taken a mortgage or deed of trust, the interest of the vendee can be foreclosed only by sale. If on the sale, the property brings more than the amount remaining unpaid under the contract, the excess belongs to the vendee.

If the security of the vendor is the retention of title, his rights should be, and are no different. He is still entitled only to the benefit of his bargain. He has available to him the remedy of foreclosure by sale, and if the property is sold for more than the balance remaining unpaid under the contract, the excess belongs to the vendee. In addition, in some circumstances, he has the remedy of strict foreclosure, or foreclosure by judicial decree. The normal procedure for such relief is an action to quiet title, the relief sought by appellants. The form of the relief is to give to vendee a fixed period of time within which to pay, and in default of payment the title of the vendor is quieted and the rights and interests of vendee are foreclosed.[28] This is the relief granted by the trial court, and is considered the harshest remedy available against a vendee. It forecloses his interest in the land without right of redemption. If the value of the land exceeds the amount unpaid under the contract, it operates as a forfeiture and penalty, and in such circumstances should not be decreed, but rather there should be a foreclosure by sale, or the vendee is entitled to restitution for the unjust enrichment of the vendor.[29]

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28. See discussion at page 56 below, and following.

29. See discussion at page 66 below.

It would seem clear that under California law, in the absence of an express provision in the contract, the vendor does not have the remedy of terminating the contract, retaining all payments made and regaining possession. He must resort to one of the remedies of foreclosure to enforce the security of his retained title. Even with an express provision in the contract, the remedy is available to the vendor only if it falls within an exception to Civil Code Section 1670, and is in all respects reasonable and bears a reasonable relationship to the actual damage suffered, and does not result in a penalty or forfeiture.

Paragraph 12 of the contract is a provision for liquidated damages. By its terms it provides the "remedy" for the seller in the event of default by purchaser. As the court said in *Freedman v. The Rector,* 37 C2d 16, 230 P2d 629, at page 21, quoting from *Ebbert v. Mercantile Trust Co.,* 213 Cal. 496, 499, 2 P2d 776,

> "A penalty need not take the form of a stipulated fixed sum; any provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty."

The provision is void under Civil Code § 1670 unless it falls within the exception of § 1671, and is reasonable as required by Civil Code § 3359.

The provision would fall within the exception of § 1671 only if "* * * * from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."[30]

A provision for liquidated damages is presumed to be invalid under § 1670, unless it is shown to come within the exception of § 1671 and is reasonable (*McInerney v. Mack,* 34 Cal. App. 153, 166 Pac. 867; *Electrical Prod. Corp. v. Williams,* 117 CA2d Supp. 813, 256 P2d 403). The party seeking to enforce a provision for liquidated damages has the burden of pleading and proving that

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30. Civil Code § 1671:
"The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

it falls within the exception and is in all respects reasonable (*Better Food Markets, Inc. v. American District Telegraph Company,* 40 C2d 179, 253 P2d 10; *Atkinson v. Pacific Fire Extinguisher Company,* 40 C2d 192, 253 P2d 18; *Petrovich v. City of Arcadia,* 36 C2d 78, 222 P2d 231; *Rice v. Schmid,* 18 C2d 382, 115 P2d 498; *McCarthy v. Tally,* 46 AC 583, 297 P2d 981). There is no such pleading or proof in this case.

In no circumstances in this case, from the vendor's point of view, would it be "impracticable or extremely difficult to fix the actual damage," resulting from a breach by vendee.[31]

Drew v. Pedlar, 87 Cal. 443, 24 Pac. 749;[32]

Knight v. Marks, 183 Cal. 354, 191 Pac. 531;[33]

Electrical Prod. Corp. v. Williams, 117 CA2d Supp. 813, 256 P2d 403;[34]

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31. Appellants concede this when they state in their brief at page 27 "We do not agree that Ward's damages would necessarily be difficult to determine." Appellants, at page 27, completely misconstrue the opinion of the trial court. The trial court was not concerned "* * * that conflicting estimates of value might make Ward's damages difficult to determine, * * *", it was rather concerned that conflicting estimates of value might make the amount of restitution to which appellee would be entitled if appellants were to get the property, difficult to determine, that is, the excess of what appellants would so receive over their actual damage. The two questions are entirely distinct.

32. A forfeiture provision in a contract for the sale of land was held to be invalid. The detriment to the vendor in the event of a breach by vendee would be the excess of the amount remaining unpaid under the contract over the value of the land (Civil Code § 3307), and in no circumstance would be impracticable or extremely difficult to fix.

33. A forfeiture provision in a lease was held to be invalid. The obligation of the lessee was to pay money, and the detriment to lessor for a breach of lessee would be the amount due with interest (Civil Code § 3302), and would not be impracticable or extremely difficult to fix. To the same effect is *Ricker v. Rombough,* 120 CA2d Supp. 912, 261 P2d 328.

34. In the case of an instalment contract, the court held that obviously detriment would not be impracticable or extremely difficult to fix, and the maximum would be the amount due under the contract, with interest (Civil Code § 3302).

Baumgarten v. Alliance Assurance Co. (N.D. Cal.), 159 Fed. 275;[35]

Major-Blakeney Corp. v. Jenkins, 121 CA2d 325, 263 P2d 655 (hearing by Supreme Court denied).[36]

A provision in a contract for liquidated damages, to be enforceable, must be reasonable and must bear a reasonable relationship to the actual detriment sustained. As the court said in *Freedman v. The Rector,* 37 C2d 16, 230 P2d 629, at page 22:

> "A penalty equal to the net benefits conferred by part performance bears no such relationship."

The provision in the case gave to vendor, on the default of vendee, the right to retain all payments made, terminate the contract and regain possession. The court said at page 22:

> "* * * its severity increases as the seriousness of the breach decreases."

The more the vendee performs under the contract, the greater is the penalty and forfeiture against him, and under such a provision a vendee who has almost completely performed would suffer the maximum penalty. The court held the provision was invalid under Civil Code § 1670.

McCarthy v. Tally, 46 AC 583, 297 P2d 981, stated that a forfeiture provision under a lease for the mere non-payment of rent would be invalid under Civil Code § 1670. The court pointed out that such a provision, to be enforced, must be a reasonable endeavor to estimate fair compensation for the loss resulting

35. Interpreting the California law, the court held that the damages for mere non-payment of money due under a contract is the amount due plus interest and nothing more (Civil Code § 3302) and a provision for liquidated damages and forfeiture was invalid.

36. A forfeiture provision in a land purchase contract was held to be invalid. On breach by vendee, the vendor is entitled only to the "benefit of his bargain", which would be the excess of the amount remaining unpaid over the value of the land (Civil Code § 3307) and this does not fall within the exception of § 1671.

to a lessor by lessee's breach. A provision for forfeiture of lessee's rights under the lease and to the property for the non-payment of rent bears no proportionate relation to the detriment that may result to a lessor by the lessee's breach.[37]

The enforcement of paragraph 12 of the contract would work a forfeiture and impose a penalty on appellee. Appellants have established that by their conduct in prosecuting this appeal.[38] Appellants have received the full purchase price of $750,000.00. They have been fully compensated for all costs, expense, loss and detriment suffered as the result of the default in the amount of $35,514.85. They have received the "full benefit of their bargain", full performance. Anything they receive beyond that would be a penalty and forfeiture. Irrespective of the circumstances or nature of the defaults, they are entitled to no more. But they are not satisfied. They prosecute this appeal because they want more than full performance. They want to retain $585,859.97 previously paid to them by appellee, they want to regain the land, which by their own testimony is presently worth more than twice the $164,140.03 remaining unpaid under the contract, and in addition to all of that they want $96,810.13, for which they levied a writ of attachment in this action. By their own testimony as to the value of the land, they are asking for in excess of $250,000.00 over and above full performance of the contract.

Appellants argue in their brief that there has been no proof that enforcement of paragraph 12 of the contract would result in a

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37. See also: *Better Food Markets, Inc. v. American District Telegraph Company,* 40 C2d 179, 253 P2d 10; *Atkinson v. Pacific Fire Extinguisher Company,* 40 C2d 192, 253 P2d 18; *Rice v. Schmid,* 18 C2d 382, 115 P2d 498; *Ebbert v. Mercantile Trust Co.,* 213 Cal. 496, 2 P2d 776; *Knight v. Marks,* 183 Cal. 354, 191 Pac. 531; *Nelson v. Dangerfield,* 125 CA2d 146, 269 P2d 953; *Major-Blakeney Corp. v. Jenkins,* 121 CA2d 325, 263 P2d 655.

38. On page 41 of their brief appellants concede that the present value of the property exceeds the amount remaining unpaid under the contract, and state "* * * otherwise, Union would not have sought to have it reinstated." Similarly, otherwise, appellants would not be seeking to forfeit the rights of appellee, and would not have exercised their election under paragraph 12 to cancel the contract.

forfeiture, because there has been no proof of the value of the use of the property while appellee had possession. They cite for this unusual proposition *Bird v. Kenworthy,* 43 C2d 656, 277 P2d 1. The argument is based on a complete misconception of the holding in the *Bird Case.* Appellants, in their statement of the case, fail to point out that prior to the commencement of the action the *buyer* had *rescinded* the contract. Rescission requires that the parties be placed in status quo, that is, in the position they would have been, if the contract had not been made. The buyer in the *Bird Case,* after his rescission, sought to recover all of the money he had paid, without any credit for the value of the use of the property which he had had for over a year. He rescinded, wanted all of his money back, and the use of the property without compensation. It is true in the *Bird Case* the buyer urged as an alternate ground, relief under Civil Code § 3275, but it was in support of, and not an alternative to, his rescission. The buyer did not retract his rescission, or attempt to be relieved of his election to rescind.

Rescission and termination and retention of amounts paid are two totally inconsistent remedies. A rescission is a termination of a contract ab initio, and the parties are to be treated as though the contract had never been made. A termination with retention of amounts paid is a substitute for money damages. Under the latter remedy the non-defaulting party is entitled to no more than he would have received in the event of full performance, the damages are substituted for the performance. The *Bird Case* is in no way opposed to this, in fact the court relies on *Freedman v. The Rector,* 37 C2d 16, 230 P2d 629, and appellants in their brief at page 18, in stating the rule of the *Freedman Case* say:

> "* * * he would be penalized in excess of *any damages he caused* (and the vendor would correspondingly be unjustly enriched) if he were denied all relief." (Emphasis added.)

What damage has appellee caused appellants by these defaults? Rank, attorney for appellants, stipulated on pre-trial conference

that the present value of the land was at least equal to the unpaid balance of the purchase price, $164,140.03, and stated on the trial "if the property is worth as much as the balance due on the contract, then he has not been damaged by the breach. * * *" (246). If appellants would sustain no damage if they received property of the value of $164,140.03, obviously they have sustained no damage if they have received cash in that amount. In this action, however, appellants not only seek the land but they also seek a money judgment for $96,810.13. They seek $96,810.13 over and above any damage sustained as the result of the breach. Of course the property is worth substantially more than $164,140.03. By appellants own evidence it had a value in excess of $300,000.00 (890, 910).[39] By appellee's evidence it had a value in excess of $800,000.00 (575, 578, 725).

Appellee has made very substantial improvements to this property. It has constructed approximately fifty miles of road at a cost of approximately $400,000.00 (571). This is not disputed. Even Ward, reluctantly, admitted that the roads were excellent (256) and have value (258), but he could not say how much. The timber expert called by appellants, also reluctantly, admitted that the roads have value (900). There is no question the roads have very substantial value, not only for logging operations to be conducted on this land, but also for fire protection and for access to many millions of feet of timber lying beyond this land (572-4, 669-670).

Even on plaintiff's theory that the parties must be put in the position they would have been in had the contract not been made, the record is clear as to the forfeiture. By their cross-complaint appellants allege that the logs removed have a "value" of $5.00 per M (48). Appellee had paid $182,503.61 over and above pay-

39. It is interesting to note that Ward, as President of two companies and individually, had for many years owned and controlled many thousands of acres of timber land in Northern California, of which the land here in question was only a small part (930), but he had no idea of the present value of this land (244).

ments on the basis of logs removed at $5.00 per M. The contract value of the logs was, of course, only $3.88 per M.[40] But in any circumstance, appellants by their cross-complaint have alleged the value of the use of the property to be $5.00 per M for logs removed. Rank recognized this on the conclusion of the trial of the case, when the court asked counsel for their views as to the form of decree that should be entered. Rank stated that the land should be returned to appellants on the payment by appellants to appellee of the difference between what had been paid and $5.00 per M for all logs removed, otherwise, appellee would be subjected to punitive damages (996-997).

To have terminated the rights of appellee under the contract and in the land would have resulted in the most outrageous forfeiture (*Barkis v. Scott,* 34 C.2d 116, 208 P2d 367).

(B) Paragraph 12, by its Terms, Is Inconsistent and Cannot Be Enforced.

Paragraph 12 of the contract goes far beyond the usual forfeiture provision. It not only provides for the retention of all payments made, the termination of the contract, and regaining possession, but it provides that appellee shall remain liable to appellants for payment of the instalments which are the basis for the forfeiture. It would require appellee to cure the defaults and nevertheless be forfeited out of its contract. They cannot both cancel the contract and enforce it.

Marquardt v. Fisher, 135 Ore. 256, 295 Pac. 499, was an action by a vendor for strict foreclosure. The trial court decreed strict foreclosure and gave a judgment for the amounts in default. This was reversed. The court pointed out that the vendor had a choice of remedies. He may sue for specific performance or he may sue for strict foreclosure. If not inequitable, the court should decree

40. The contract price of $3.88 was, at the time of the contract, high. The Wilson interests purchased land adjacent to this land, a substantial part of it closer to the public highways than this land, at approximately the same time, for $3.00 per M (233, 527, 533).

that the vendee pay within a reasonable time, or be foreclosed of his equities in the property. If strict foreclosure is inequitable, that is, if the value of the property exceeds the amount remaining unpaid, then it is the duty of the court, if the money is not paid by the vendee, to order the property sold, and to satisfy the vendor's interest from the proceeds of the sale. In any event, the vendor cannot both foreclose the equities of the vendee and have a judgment for the amounts due. The court said at page 500 of the Pacific report:

> "The payment of the money, whether under the compulsion of a judgment or voluntarily made, would operate to reinstate the contract and continue it in force, and thus preserve the vendee's equities under the contract. * * * "

In *Ricker v. Rombough,* 120 CA2d Supp. 912, 261 P2d 328, the lease provided that on default of lessee the lessor could regain possession and recover all rents unpaid to the date of regaining possession. The court held the provision to be invalid.

California Raisin Pool v. Balian, 139 Cal. App. 343, 34 P2d 227, involved a contract for the sale of land, under which it was provided that a part of the proceeds of the crop on the land, to be harvested by vendee, were to be paid to vendor on the purchase price. The contract was thereafter terminated for breach by vendee, and vendor regained possession. In this action vendor sought to recover a part of the proceeds of the crop that had been removed prior to the time of termination. The court denied recovery and said at page 348:

> "It is undoubted law that a vendor having elected to forfeit and terminate a vendee's rights, under a contract for the sale and purchase of real estate, cannot thereafter recover the unpaid installments of the purchase price, since by virtue of the termination of the contract these cease to be enforceable obligations. [Citing cases.] So far as Balian's indebtedness represented the purchase price of the land or any interest thereon, it is apparent that after the contract was terminated he was no more obligated to deliver *in futuro* raisins that he had severed from the ground while the con-

> tract was in force than he was to make *in futuro* payments that had accrued under it while it was in force. The stipulation for delivery of the raisins amounted merely to a stipulation for making payments in that form."

Glassell v. Coleman, 94 Cal. 260, 29 Pac. 508, involved a contract for the sale of land, under which vendee had given his promissory notes for a part of the purchase price. The contract expressly provided that on default by vendee, the vendor could terminate the contract, regain possession, retain all payments made, and enforce the promissory notes. The court held the notes were unenforceable. The liability of the vendee to pay any part of the purchase price ceased when the vendor terminated the vendee's right to receive the land on payment of the purchase price.

In *Beck v. Shepard Fruit Co., Inc.,* 19 CA2d 590, 66 P2d 188, the contract for the sale of land provided that the proceeds of the fruit crop were to be paid to the vendor on the purchase price. The vendor terminated the contract for a breach by vendee and sought and obtained, by default, a decree quieting his title to the land. He now sues for the proceeds of the crop and for taxes. The court denied recovery. The court stated that on breach by the vendee the vendor had an election either to terminate the contract or to keep the contract alive and recover the payments due, and said at page 598:

> "They were not, however, entitled to seek both of these obviously inconsistent remedies, and they were consequently put to their election as to which of the two they would pursue."

To the same effect and holding that, after termination, the vendor could not recover proceeds from the sale of the crop which, by the contract, were to be paid to the vendor on the purchase price, are, *Yakoobian v. Johnson,* 102 Cal. App. 10, 282 Pac. 522, and *Security-First National Bank v. Hauer,* 47 CA2d 302, 117 P2d 952.

In *Cross v. Mayo,* 167 Cal. 594, 140 Pac. 283, the trial court entered a decree of strict foreclosure and a judgment for the

amounts which were in default under the contract. This was reversed and the court said at page 607:

> "Manifestly defendant cannot properly be required to pay the amount for failure to pay which his rights under the contract are declared forfeited, or, to state it in different words, plaintiff cannot have both a forfeiture and enforcement of the contract at the same time. To sustain such a recovery here would be in effect to require defendant to partially perform his agreement of purchase, and at the same time foreclose all his rights under such agreement."

Portner v. Tanner, 30 Wyo. 85, 216 Pac. 1069, 30 A.L.R. 624, was a case in which the vendee had given the vendor a check in payment of a part of the purchase price. The vendee then repudiated the contract and stopped payment on the check, and the vendor, under the forfeiture provision of the contract, terminated the contract. The vendor now seeks to recover the amount of the check. It was held that he could not. The court said at page 627:

> "When the defendant repudiated the agreement made, several courses were open to the plaintiff to pursue, not all of which are necessary to be considered. * * * It was, in any event, open to the plaintiff, on the one hand, to consider the contract as still in force, sue for the breach in its terms or the enforcement thereof, or, on the other hand, to disaffirm the contract, consider it no longer in existence, and sue for the total abandonment or repudiation or breach of it by the defendant, and recover whatever damages he might have sustained. But under the doctrine of election of remedies, plaintiff could not take both of these courses. He could not consider the contract as still in force and at the same time as not in force. He could not affirm it and disaffirm it at the same time; and having once definitely and irrevocably taken one course, that would be binding, and he could not thereafter also pursue a remedy inconsistent therewith."

Plaintiff contended that this was not an action for the purchase money but rather for damages. The court disagreed and said at pages 627-628:

"The case at bar is a suit upon checks which were given as the first payment under the contract. The checks represent part of the unpaid purchase money. A suit thereon, therefore, arises out of or is an incident to one of the covenants of the contract, and necessarily recognizes the contract as still in force and effect."

By its very terms paragraph 12 of the contract is inconsistent and cannot be enforced. By its terms it provides that the seller shall have the right "to cancel this agreement" and "to recover from the purchaser" all unpaid instalments. If the agreement is cancelled it is cancelled for all purposes. It cannot be cancelled in part and enforced in part. Appellants might as well provide that all provisions of the contract except paragraph 2, providing for payment of the purchase price, be cancelled.

The provision by its terms being inconsistent, it is invalid and cannot be enforced. It cannot be enforced in part and disregarded in part. If it cannot be enforced in toto, it cannot be enforced at all. The provision does not give appellants an alternative. They cannot have both. The provision, therefore, must be disregarded, and appellants can enforce no right or remedy under it. They are remitted to the normal and usual remedies available to a vendor in a case of this kind. By the decree in this case they have received the maximum remedy, and the harshest remedy against vendee, to which they would, in any circumstance, be entitled.

(C) By Asserting Rights Under the Contract After the Notice of Cancellation, and by Obtaining a Writ of Attachment, Appellants Have Made an Election of Remedies and Cannot Now Terminate.

On the breach by appellee, appellants had an election either to disaffirm or affirm the contract. They have affirmed the contract. On May 12, 1954, appellants served on appellee their notice of cancellation. On May 13, 1954, appellants made demand on appellee for the payment of all amounts then in default, including taxes. The demand on May 13, 1954, without more, would constitute a waiver of their right to terminate.

Neet v. Holmes, 25 C2d 447, 154 P2d 854, was an action under a contract for sale of land. The court said at page 459:

> "He cannot by words cancel his contract and then continue to assert rights and benefits under it. * * *",

and by so doing it was held that he waived his right to cancel and affirmed the contract, *as a matter of law.*

In *Kern Sunset Oil Co. v. Good Roads Oil Co.,* 214 Cal. 435, 6 P2d 71, the lessor accepted royalty payments under an oil lease after having declared a forfeiture. It was held that by asserting rights under and accepting benefits under the contract, after the notice of forfeiture, he waived his right to forfeit. The lessor argued that the royalty payments were a percentage interest of the oil removed, which were rightfully his whether the lease was in existence or not. The court held that this would not change the universal rule of waiver, because he accepted the royalty payments under the lease and therefore had to affirm the continued existence of the lease. After the notice of cancellation he continued to treat the lease as a subsisting agreement, and therefore waived his right to cancel.[41]

The demand by appellants on May 13, 1954, was a demand for payments on the basis of logs removed prior to the termination, and *a demand for the payment of taxes* that had accrued prior to that time. The contract provides that appellee was to pay taxes. The contract nowhere provides that after cancellation appellee shall pay taxes, irrespective of when the taxes accrued. Paragraph 12 does not give appellants the right to recover from appellee taxes after the cancellation of the agreement. The demand for taxes could be only on the basis that the contract was still in existence. It was a clear and unequivocal affirmance of the contract and waived the right to cancel.

The two causes of action of appellants cross complaint, to quiet their title and recover all instalments and taxes due, are, of course, inconsistent. The cause of action to quiet title is based on a can-

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41. This case is more fully discussed above at page 30.

cellation and disaffirmance of the contract. The cause of action for instalments due and for taxes, can only be on the basis of an affirmance of the contract. They are not pleaded in the alternative, but appellants ask for both. Under the modern form of pleading it is not improper to set forth inconsistent causes of action in a complaint. The plaintiff is not, however, entitled to relief on both. At some point he must make his election.

Kittle Manufacturing Co. v. Davis, 8 CA2d 504, 47 P2d 1089, was an action on a royalty contract. Plaintiff had previously been in default in the payment of royalties, and defendant sets up those defaults as a defense to this action. But it appeared that defendant had previously sued for and recovered the amount of royalties in default, and it was therefore held that the prior default by plaintiff was not a defense to this action. The court held that if defendant had had the right to terminate the contract for the non-payment of royalties by plaintiff, he had waived that right by suing for the royalty payments. He had made his election. Having enforced performance by plaintiff he could not now rely on the non-performance to excuse his own performance. A court will not compel one party to a contract to perform it and excuse performance by the other. A contract must be enforced against both the parties or it will not be enforced against either. (See also, *House v. Piercy,* 181 Cal. 247, 183 Pac. 807.)

Appellants in this action have made their election. On the filing of the cross-complaint they had issued a writ of attachment for the money damages claimed. The writ was levied on the Bank of America at Arcata, California, and $21,528.30 of appellee's money was impounded. In addition, the writ was levied on other timber land owned by appellee of a value of approximately $250,000.00 (707). The attachment was never released.

In *Steiner v. Rowley,* 35 C2d 713, 221 P2d 9, plaintiff pleaded inconsistent causes of action in contract and in tort. Plaintiff obtained a writ of attachment and the court held that this constituted an election of remedies and that plaintiff could therefore proceed only on the contractual remedy. The court said at page 720:

> "Concerning the effect of the writ of attachment obtained by the Steiners, the doctrine of election of remedies is based upon the principal of estoppel. 'Whenever a party entitled to enforce two remedies either institutes an action upon one of such remedies or performs any act in pursuit of such remedy, whereby he has gained any advantage over the other party, * * * he will be held to have made an election of such remedy, and will not be entitled to pursue any other remedy for the enforcement of his right.' " [Citing *DeLaval Pac. Co. v. United C. & D. Co.,* 65 Cal. App. 584, 586, 224 Pac. 766.]

When plaintiff obtained a writ of attachment this was a positive act in pursuit of a contractual remedy, and therefore he had gained an advantage over the defendant and had made an election. Plaintiff was thereafter estopped to pursue any remedy other than that for which he had obtained the writ of attachment.

In *Jones v. Martin,* 41 C2d 23, 256 P2d 905, the court in following the *Steiner Case* said at page 33:

> "In *Steiner v. Rowley,* 35 Cal. 2d 713, [221 P.2d 9], the complaint had counts on contract and tort involving the same transaction. Plaintiff attached and it was held that he was estopped to rely upon the action in tort. Similarly, here plaintiff attached the bank account of Wellins indicating reliance upon a contract debt rather than a claim to specific property as the beneficiary of a constructive trust."

To the same effect are *Gedstad v. Ellichman,* 124 CA2d 831, 269 P2d 661 and *Sears Roebuck and Company v. Blade,* 139 ACA 620, 294 P2d 140.

By the issuance of the writ of attachment appellants elected to proceed under the contract, and they cannot now be heard to say that the contract is terminated. By their cross-complaint and writ of attachment plaintiffs sought to recover partial payments due under the contract. By the decree of the trial court in this action plantiffs have recovered the full purchase price under the contract. They cannot complain of that judgment on this appeal.

IV.

EVEN IF THE DEFAULTS WERE WILFUL, THE JUDGMENT WAS PROPER AND WITHIN THE DISCRETION OF THE COURT.

The judgment appealed from did *not* reinstate appellee under the contract. The condition of the judgment was that appellee pay the full unpaid purchase price of $164,140.03, which was an accelerated payment under the contract, by more than a year, of $76,410.86.[42]

The judgment did not grant restitution to appellee.[43] The problems of restitution and "unjust enrichment" are not involved on this appeal.[44]

The judgment can be supported by *Freedman v. The Rector,* 37 C2d 16, 230 P2d 629, alone. The *Freedman* Case does *not* hold that the only relief available to a wilfully defaulting vendee is restitution.[45] The case does hold that relief is not dependent on Civil Code § 3275. In that case the vendee sought specific performance, and in the alternative, restitution of the amounts he had paid. The vendee had repudiated the contract (his default was wilful), and the vendor had resold the property. The court denied specific performance, *not* on the ground that the vendee had repudiated his contract, but rather, specifically, on the ground that the *vendee had not withdrawn his repudiation prior to the resale of the property by the vendor.* The case can only be interpreted to mean

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42. Obviously the judgment does not "repeal" Civil Code §§ 1492 and 3275, as stated in appellants' brief at page 30. The judgment is neither contrary to nor dependent upon either of those sections.

43. The interlocutory decree did provide for restitution in the event appellee failed to make the payments required and appellants' title to the land was quieted. It also provided, however, that in such event, further evidence would be taken to determine the amount of unjust enrichment. This alternative provision of the decree did not become effective, because appellee did pay the required amounts.

44. The only question involved in *Bird v. Kenworthy,* 43 C.2d 656, 277 P.2d 1, was one of unjust enrichment after a rescission by the buyer. Proof of "unjust enrichment" is *not* a prerequisite to the relief granted by the judgment, and appellants cite no authority for the statement in their brief, at page 31, that it is.

45. Expressed as the "opinion" of appellants at page 19 of their brief.

that if the contract could have been specifically enforced, it would have been, irrespective of the wilful default. This is in accord with the statement of the court in *Barkis v. Scott,* 34 C2d 116, 208 P2d 367, at page 121:

> "A vendee in default who is seeking to keep the contract alive, however, is in a better position to secure relief than one who is seeking to recover back the excess of what he has paid over the amount necessary to give the vendor the benefit of his bargain after performance under the contract has terminated."

The *Freedman* Case cannot be interpreted as restricting the form of relief to be granted. The court granted the only relief possible, restitution.

The judgment in this case is not a form of relief which originated with or is directly dependent upon the line of recent California decisions starting with *Barkis v. Scott,* supra. It is true that these cases, as was pointed out by the Court below, "point the way", and evidence further that the purchaser under a land contract is in a position similar to that of a mortgagor and will be protected from forfeitures and oppressive provisions. The granting to the defaulting purchaser the opportunity to complete his contract by payment of amounts due accords with a practice established in the courts of this state and in other American jurisdictions for practically a century.

The judgment is one of strict foreclosure. This type of decree has been rendered by California courts as a means of terminating the interest of a defaulting purchaser in a contract for the sale of land at least as early as the case of *Sparks v. Hess,* 15 Cal. 186 (1860). The decree of strict foreclosure was approved in *Glock v. Howard, Etc. Co.,* 123 Cal. 1, 10-11, 55 Pac. 713,[46] the leading

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46. The court cited, with approval, *Keller v. Lewis,* 53 Cal. 113 and *Fairchild v. Mullan,* 90 Cal. 190, 27 Pac. 201, in both of which cases the court gave the purchaser a fixed time within which to pay the balance due under the contract, in default of which the vendor's title would be quieted. See below page 58.

case marking "the days when the rights of defaulting vendees were at their lowest ebb in California" (141-142).

The long standing legal basis for the decree of strict foreclosure, as distinct from the recently established authority for restitution to a defaulting vendee, was clearly stated in *Petersen v. Ridenour,* 135 CA2d 720, 287 P2d 848, decided in September, 1955 (after the decree below). The vendor sought to quiet title to residence property being sold under an instalment contract. The contract contained the usual provision making time of the essence and stating that on default the purchaser should forfeit all right to the property and to all money paid under the contract as liquidated damages. Defaults occurred, and the trial court quieted title in the vendor. The judgment was reversed with directions to give the purchaser an opportunity to cure his defaults.

In its opinion the Court went out of its way to show that the relief to which the purchaser was entitled—opportunity to cure his defaults, was not dependent upon the line of cases beginning with *Barkis v. Scott,* and said at page 726:

> "It appears that they have had possession of the premises ever since the deal was made in 1948; the rental value is not shown; what the fair value of the property was at time of breach of contract was not proved. Matters such as these are essential to determination of whether there would be unjust enrichment resulting from a judgment quieting title."

The Court went on, however, to hold that these matters were not essential when the purchaser seeks the opportunity to pay the amounts then due, and in such circumstance the claim "does not properly rest upon the *Barkis* line of cases." The Court said, at page 728:

> "The averment of an offer to pay any arrearages found to exist invoked another line of applicable cases, having to do with termination of a vendee's rights at the suit of the vendor.
>
> "A quiet title action brought to terminate a contract for sale of realty is essentially a strict foreclosure. (*Warner Bros. Co. v. Freud,* 138 Cal. 651, 654 [72 P. 345]; 27 Cal. L. Rev. p. 584, n. 6). And in 'such case the court finds the amount unpaid, and decrees that it be paid on or before a day stated,

and upon failure to make the payment that defendant's equity be foreclosed' (*Warner Bros.* at p. 654), this because it is 'in consonance with equity.' (*Kornblum v. Arthurs,* 154 Cal. 246, 249 [97 P. 420].) That this is the proper practice is also held in *Keller v. Lewis,* 53 Cal. 113, 118; *Southern Pac. Co. v. Allen,* 112 Cal. 455, 462 [44 P. 796]; *Odd Fellows' Sav. Bank v. Brander,* 124 Cal. 255, 257 [56 P. 1109]; *Cross v. Mayo,* 167 Cal. 594, 605 [140 P. 283].)"

It will be noted that the purchaser in *Petersen v. Ridenour* was held entitled to reinstate the contract by paying the amount then due; there was no acceleration of future payments. The Court notes, at page 720, "there was no plea of waiver or estoppel", and no issue was raised or discussed as to whether the purchaser's default was wilful. The relief granted depended not on Civil Code § 3275 or *Barkis v. Scott.*

In *Keller v. Lewis,* 53 Cal. 113, a judgment for the vendor quieting title and declaring the payments made forfeited, was reversed with directions to give the purchaser a fixed day within which to pay the balance due, or be foreclosed of his interest in the land. The Court said at page 118:

"It is a *universal rule* in equity never to enforce either a penalty or forfeiture. (2 Story's Eq., 1319, and cases cited.) On the contrary, equity frequently interposes to prevent the enforcement of a forfeiture at law. In the view of a Court of Equity, in cases like the present, the legal title is retained by the vendor as security for the balance of the purchase money, and if the vendor obtains his money and interest he gets all he expected when he entered into the contract. * * * his better remedy, in case of persistent default on the part of the vendee, is to institute proceedings to foreclose the right of the vendee to purchase; the decree usually giving the latter a definite time within which to perform. (Hansborough v. Peck, 5 Wallace, 506.)"

In *Cross v. Mayo,* 167 Cal. 594, 140 Pac. 283, the Court said at page 605:

"The trial court followed the practice suggested in *Keller v. Lewis,* 53 Cal. 113, and followed in *Kornblum v. Arthurs,*

154 Cal. 246, [97 Pac. 420] and many other cases, of fixing a time within which defendant should pay the amounts due upon said contract, or be foreclosed of all his rights under the contract. As was said in the case last cited 'this was in consonance with equity.' "

The Court in *Kornblum v. Arthurs,* 154 Cal. 246, 97 Pac. 420, said at page 249:

"The court decreed a foreclosure of plaintiff's interest, allowing him, however, ten days in which to preserve his rights to the property upon payment of the moneys provided in his contract. This was in consonance with equity."

In *Odd Fellows' Savings Bank v. Brander,* 124 Cal. 255, 56 Pac. 1109, the trial court ordered that the purchaser "should perform his contract within sixty days or be foreclosed of his rights under the same." The court said at page 257:

"The course pursued in this case was in harmony with the well-settled practice in this state in like cases."

The discretion of a court of equity to make such a decree has never been doubted, and has been repeatedly followed:

Southern Pacific Railroad Co. v. Allen, 112 Cal. 455, 44 Pac. 796;[47]

Gates v. Green, 151 Cal. 65, 90 Pac. 189;[48]

Fairchild v. Mullan, 90 Cal. 190, 27 Pac. 201;[49]

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47. The court said at page 462: "The decree gave the defendant the alternative of paying within six months, or suffering foreclosure; and this was in accordance with equity."

48. The court said at page 69: "In such cases, it is settled by our decisions that the judgment should fix a reasonable time within which the vendee may pay the balance due on the contract, before he is forever foreclosed of all right or interest in the lands, or to a conveyance thereof."

49. The judgment gave purchaser 90 days to complete his purchase, and failing that, quieted the vendor's title. The court said at page 194: "Mullan having failed to complete his purchase, the proceeding to foreclose his rights under the contract is strictly in accordance with the practice in equity, and has been expressly sanctioned in this court."

Wilson v. Beazley, 186 Cal. 437, 199 Pac. 772;
Stratton v. California Land and Timber Co., 86 Cal. 353, 24 Pac. 1065;
Sparks v. Hess, 15 Cal. 186;[50]
Veterans' Welfare Board v. Burt, 4 CA2d 659, 41 P2d 587;[51]
Los Angeles Auto Tractor Co. v. Superior Court, 94 Cal. App. 433, 271 Pac. 363;[52]
Johnston v. Mulcahy, 4 Cal. App. 547, 88 Pac. 491.

In *Cross v. Mayo,* supra, and *Southern Pacific Railroad Co. v. Allen,* supra, the amount required to be paid was, as in *Petersen v. Ridenour,* supra, less than the entire balance of the purchase price. In most of the cases, it is made clear that the entire balance of the purchase price was due at the time of the decree. In none of the cases was the practice approved or followed of imposing upon the purchaser, under a contract containing no acceleration clause, the requirement of paying the entire balance of the purchase price, including instalments not yet due, in order to save his rights under the contract. The decree rendered by the court below, which required payment of $76,410.86 not yet due, was in this respect harsher against appellee than the type of decree traditionally approved and rendered in the California courts.

On page 29 of appellants' brief an attempt is made to distinguish some of these cases by the statement that in none of them was time of the essence, nor did the contract provide for cancellation in the event of default by the vendee. These cases can-

50. Stating that the vendor retains legal title as security for the purchase money, and may either sue at law for the balance due, or seek foreclosure by sale or strict foreclosure.

51. Holding that the trial court had discretion whether or not to give the purchaser an opportunity to perform, where vendor had given purchaser 30 days, and purchaser had been in possession for 1 year and had paid only a five percent down payment and one monthly instalment.

52. The court denied mandamus to compel the trial court to foreclose the vendee's interest, where the court had originally granted vendee 30 days to perform, and then granted successive extensions until over one year had elapsed.

not be so distinguished. Four of them[53] cite and rely on, *Hansbrough v. Peck,* 72 US [5 Wall.] 497, 18 L ed 520, involving a contract in which time was expressly made of the essence, and the vendor could cancel and retain all payments in case of default by the purchaser.[54] In *Veterans' Welfare Board v. Burt,* 4 CA2d 659, 41 P2d 587, (1935) the vendor was an agency of the State of California, operating under a State Statute which authorized cancellation and forfeiture in the event of default (See Military and Veterans' Code § 825).

In the strict foreclosure cases it generally does not appear whether time was expressly made of the essence. The reason is clear. A decree of strict foreclosure presupposes a material breach. If the breach were not material, the vendor might have a claim for damages for the delay but could not terminate the contract. The phrase "time is of the essence" means no more than that a breach in the time provision is material. Appellants contend (p. 29 of appellants' brief) that the strict foreclosure cases "were governed by § 1492 of the Civil Code of California which expressly

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53. *Keller v. Lewis,* 53 Cal. 113; *Stratton v. California Land and Timber Company,* 86 Cal. 353, 24 Pac. 1065; *Southern Pacific Railroad Co. v. Allen,* 112 Cal. 455, 44 Pac. 796; *Odd Fellows' Savings Bank v. Brander,* 124 Cal. 255, 56 Pac. 1109.

54. "In case of a default in the payments, there are several remedies open to the vendor. He may sue on the contract and recover judgment for the purchase money, and take out execution against the property of the defendant, and among other property, the lands sold; or he may bring ejectment, and recover back the possession; but in that case, the purchaser, by going into a court of equity within a reasonable time and offering payment of the purchase money, together with costs, is entitled to a performance of the contract; or the vendor may go in the first instance into a court of equity, as in the present case, and call on the purchaser to come forward and pay the money due, or be forever thereafter foreclosed from setting up any claim against the estate. In these contracts for the sale of real estate the vendor holds the legal title as a security for the payment of the purchase money, and in case of a persistent default, his better remedy, and under some circumstances his only safe remedy, is to institute proceedings in the proper court to foreclose the equity of the purchaser where partial payments or valuable improvements have been made. The court will usually give him a day, if he desires it, to raise the money, longer or shorter, depending on the particular circumstances of the case, and to perform his part of the agreement" (72 US [5 Wall.] 507, 18 L ed. 523).

allows an offer of performance to be made after default, where time is not of the essence." These cases are not controlled by § 1492, and do not purport to be. If § 1492 were applicable, there could be *no* foreclosure unless and until a breach *was* "of the essence", i.e., a material breach.

Appellants say (p. 29 of appellants' brief) that in none of these strict foreclosure cases does it appear that the breach was wilful. Conversely it can be said that in none of them is the breach declared to be non-wilful. Wilfulness is simply not an issue, for the opportunity given the purchaser to pay the amounts due under the contract in no way depends on Civil Code § 3275. Some of the cases show on their facts that the breach involved would have been found to be wilful, if that had been an issue. In *Cross v. Mayo,* 167 Cal. 594, 140 Pac. 283, the contract provided that the purchaser could sell cattle on the land only upon obtaining the written consent of the vendor and applying the proceeds of sale to the unpaid purchase price. One of the defaults was the sale of cattle without the consent of the vendor and without accounting for any part of the proceeds. Yet, the purchaser was given time in which to pay the amounts due under the contract *to date,* and thus cure the default.

In *Wilson v. Beazley,* 186 Cal. 437, 199 Pac. 772, there was a repudiation by vendee, a wilful breach, and the court decreed strict foreclosure, giving the vendee time within which to pay.

Appellants attempt to distinguish *Nelson v. Dangerfield,* 125 CA2d 146, 269 P2d 953 by stating (p. 25 of appellants' brief) the court permitted a "non-wilfully defaulting vendee" to reinstate the contract or, failing that, to have restitution in the amount of vendor's unjust enrichment. There was no finding and no discussion in the case as to whether or not the default was wilful. The relief granted (which required only the payment of amounts due) simply did not turn on any question of wilfulness.

Appellants state (p. 29 of appellants' brief) that in most of the cases approving decrees of strict foreclosure the appeal was by the

purchaser and not by the vendor. The distinction is not apparent.[55] In a very early case, *Keller v. Lewis,* 53 Cal. 113 (1878) and in the latest case, *Petersen v. Ridenour,* 135 CA2d 720, 287 P2d 848 (September 1955) the appeals were by purchasers from decrees absolutely quieting title in the vendor, in which the judgments were reversed with directions to give the purchaser the opportunity to make the payments due under the contract.

Appellants (p. 12-14 of appellants' brief) cite three decisions of this court, *Federal Farm Mortgage Corporation v. Davis,* 132 F2d 663; *Starr King School for the Ministry v. Kinne,* 146 F2d 8, (Cert. Den, 325 US 850, 89 L ed 1970); and *Wuchner v. Goggin,* 175 F2d 261. With deference to this Court, we should like to point out that in none of those three opinions was there any reference to any of the California cases cited above, which approve the practice of strict foreclosure. The California law on the point has been particularly clarified and restated in *Petersen v. Ridenour,* 135 CA2d 720, 287 P2d 848, discussed above, pp. 57-58.

These cases of strict foreclosure do no more than give effect to the long recognized rule in California that a vendor under a land sales contract who retains title, has a security interest only. In equity, the vendee is considered to be the owner of the land. The vendor has no greater rights than if he had conveyed the land and taken back a mortgage for the unpaid purchase price.[56]

The rule is expressed in 3 Williston on Contracts (Rev. ed. 1936) § 791, pages 2224-2230, where the learned author says with

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55. In all of these cases the action was by the vendor to quiet his title (the relief sought by appellants). In each, judgment was entered quieting vendor's title, conditioned on the failure of vendee to pay (the judgment from which appellants appeal). It is not customary, of course, for a party to appeal from a judgment which grants him the relief for which he prayed. It is apparent that the vendors in these cases were satisfied to receive the "benefit of their bargain", full performance.

56. See, in addition to the above cases: *Kent v. San Francisco Sav. Union,* 130 Cal. 401, 62 Pac. 621; *Longmaid v. Coulter,* 123 Cal. 208, 55 Pac. 791; *Miller v. Waddingham,* 91 Cal. 377, 27 Pac. 750; *Gessner v. Palmateer,* 89 Cal. 89, 26 Pac. 789; *Baum v. Grigsby,* 21 Cal. 172; *Pickering Lbr. Co. v. Whiteside,* 54 CA 2d 200, 128 P.2d 899; *Estate of Reid,* 26 CA 2d 362, 79 P.2d 451; *Cohn v. Valentine,* 88 Cal. App. 430, 263 Pac. 846.

respect to an executory contract for the sale of land in which the purchaser is in possession, that "the situation should be dealt with in the same way as a mortgage situation is dealt with" (p. 2227).

> "Where the transaction is in its essence a mortgage, agreements for forfeiture and provisions that time is of the essence should be given no more weight than similar provisions in a mortgage. * * * In a majority of cases, however, equitable relief has been given a purchaser in possession against provisions making time essential, the situation being rightly treated as substantially the same as that of mortgagor and mortgagee, and the provision for forfeiture as ineffectual as in a mortgage."

Ferguson v. Blood, 152 Fed. 98 (Cir. 9) (1907) was a case arising in the District Court of Idaho, and affirming a judgment of foreclosure by sale with deficiency judgment against the purchaser. On page 103 the Court said:

> "Where one contracts to convey real estate to another upon the payment of the agreed price, retaining the title until payment is fully made, it is not very important, in our opinion, what the security so retained is called, whether a trust, a vendor's lien, an equitable mortgage, an equitable security, or any other kind of a lien. Like the Supreme Court of Tennessee:
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> " 'We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure the payment of a debt. In both cases, courts of chancery consider the estate only as security for the payment of the debt, upon a discharge of which the debtor is entitled to a conveyance in one instance, and a reconveyance in the other.' *Graham v. McCampbell,* 19 Tenn. 52, 33 Am. Dec. 126.
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> "Where the title is retained by the seller as security for the payment of the debt, the security is, in this country, very generally regarded as possessing all the essential features of a mortgage, and the vendor as standing for all practical purposes as mortgagee in relation to the vendee." (Citing cases.)

The California Legislature has treated the purchaser under an instalment contract for the sale of land as a mortgagor.[57]

In *Estate of Reid,* 26 CA2d 362, 79 P2d 451, numerous California authorities are collected which demonstrate various aspects of the principle that the purchaser is to be treated as the equitable owner, and the vendor as holding the bare legal title merely as security for the purchase price.

In *Weil v. Barthel,* 279 P2d 544, subsequent opinion on rehearing, 45 C2d 835, 291 P2d 30, the California Supreme Court in its first opinion held that a purchaser under an executory contract for the sale of land against whom a court had ordered a foreclosure sale to enforce the vendor's lien for the purchase price, was entitled to a statutory right of redemption pursuant to provisions applicable to sales on execution upon real property. The Court cited cases "emphasiz[ing] the similarity which exists between a transaction in which the vendor retains legal title as security and the ordinary mortgage" (279 P2d 551). The Court then stated that the provision for redemption, now Code of Civil Procedure § 700a, had been construed in early cases as applying to redemption not only from sales on execution but also to sales on foreclosure of a mortgage (prior to the specific provisions now made for redemption from mortgage foreclosure sales).

In the course of the opinion the Court contrasts the remedy of strict foreclosure, characterized by a period fixed by the Court in which the defaulting vendee may pay the amounts due and preserve his rights under the contract, with the remedy of foreclosure by sale. The opinion approves the exercise of discretion by the trial court in ordering a sale to preserve the rights of both the vendor

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57. Civil Code § 1662, the Uniform Vendor and Purchaser Risk Act, puts the risk of loss on the purchaser if either the title *or the possession has been transferred* (Paragraph 16 of the contract (22) puts the risk of loss on appellee).

Code of Civil Procedure § 580(b) provides: "No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property."

and vendee. In the opinion on rehearing the Supreme Court decided that the question of the purchaser's equity of redemption had been decided adversely to the purchaser in a prior decree in an action between the same parties and that it could not be attacked as incorrect because "an erroneous judgment is as conclusive as a correct one." Nothing was said contrary to the portions of the earlier opinion referred to above, and although that earlier opinion was technically vacated, it remains a useful guide to this court in determining "what the highest court of California would hold if confronted with the controversy now presented to us." *Compania Engraw v. Schenley,* 181 F2d 876, 879 (Circ. 9).

Strict foreclosure is the harshest of remedies. In many circumstances the rights of the vendee should be foreclosed only by judicial sale (as approved in *Weil v. Barthel,* supra).

In *Sheehan v. McKinstry,* 105 Ore. 473, 210 Pac. 167, the Court said that the vendor has, against a defaulting vendee, the remedy of strict foreclosure, a remedy that is "not affected by statute, but is * * * controlled entirely by equitable principles." The court then states at 210 Pac. 171:

> "If, however, the vendee has paid a considerable portion of the purchase price, or if the property has largely enhanced in value, or if, for any other reason, it would be inequitable to grant a strict foreclosure, it is within the inherent powers of a court of chancery, independent of statute, to decree that the property be sold by judicial sale and that the proceeds of such sale, after the purchase price and the expenses of such sale have been paid, be paid over to the vendee or to those entitled thereto."

See also *Marquardt v. Fisher,* 135 Ore. 256, 295 Pac. 499.[58]

The authors of the treatise on "Vendor and Purchaser", part 11 in American Law of Property, Volume III, make the same point even more strongly (§ 11.75, pp. 190-191):

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58. In which the court states, in such circumstance it is the *duty* of the court to order a sale.

See also: 17 Ore. L. Rev. 33 (1938).

" 'Strict foreclosure should only be permitted where no substantial payment has been made, or where the present value of the land is less than the amount due vendor, or where, purchaser having made improvements under the contract, vendor elects to pay for them.' [citing Pound, Progress of the Law, 33 Harv. L. Rev. 833 (1920)] When the situation is not in one of these categories, the court should on application and proof, on the basis either of local statute or general equitable principles, require that the foreclosure be by judicial sale."

The Nebraska court explicitly states in *Swanson v. Madsen,* 145 Neb. 815, 18 NW2d 217, 220:

"We think the rule is that a contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered, and where such procedure would not offend against justice and equity. Courts of equity will decree a strict foreclosure only under special circumstances where it would be inequitable and unjust to refuse them. Whether or not such a decree will be granted is dependent upon the facts of the particular case being considered and is necessarily addressed to the sound judicial discretion of the court. Harrington v. Birdsall, 38 Neb. 176, 56 N.W. 961. But where such a decree is entered, the defaulting party is entitled to a reasonable time to avoid its consequences by performing the contract. Patterson v. Mikkelson, 86 Neb. 512, 125 N.W. 1104."[59]

It is elementary that if the proceeds of a judicial sale for foreclosure of the purchaser's interest brings more than the amount due the vendor plus the costs of sale, the surplus belongs to the purchaser (*Sparks v. Hess,* 15 Cal. 186, 194; *Gouldin v. Buckelew,* 4 Cal. 107).

Indeed, the last cited California case goes even farther. It states that if on default of the purchaser the vendor recovers possession of the property (as distinct from bringing a proceeding for fore-

59. See also: 14 Minn. L. Rev. 342, 359 (1930).

closure in order to quiet his title), the vendor may hold possession only until the rents and profits have paid him the purchase money, and then equity would compel him to convey to the purchaser.

The vendor, like the mortgagee, is entitled to be made whole by being paid the amount he would have received had the contract been performed, but to give him more is inequitable to the vendee, and a forfeiture.

CONCLUSION

Appellants have received the full purchase price for the property. They have been fully compensated for all loss or damage sustained (including attorneys' fees not normally granted).

The court of equity, in its sound discretion, has molded a "just and appropriate equity decree" (138). The judgment must be affirmed.

Dated, San Francisco, California,
July 18, 1956.

Respectfully submitted,

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